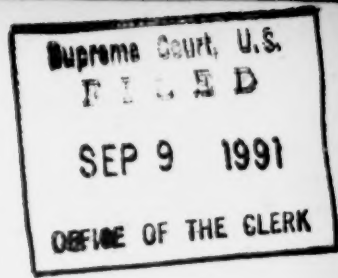


91-4293



No. 91-

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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In Re GEORGE R. WESTFALL,  
*Petitioner.*

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**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSOURI**

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RICHARD J. LAZARUS  
Washington University  
School of Law  
St. Louis, Missouri 63130

*Of Counsel*

GEORGE E. SCHAAF\*  
GERALD P. GREIMAN  
GREEN, HOFFMANN & DANKENBRING  
7733 Forsyth Blvd., Suite 800  
St. Louis, Missouri 63105  
(314) 862-6800

*Counsel for Petitioner*

*\*Counsel of Record*



## TABLE OF CONTENTS

	Page
APPENDIX A - Missouri Supreme Court Opinions	
Original Disciplinary Proceeding (Covington, J.) .....	A-1
Concurring Opinion (Seiler, Sr. J.) .....	A-19
Dissenting Opinion (Blackmar, C. J.) .....	A-21
APPENDIX B - Report of Special Master .....	A-42
APPENDIX C - Judgment.....	A-102
APPENDIX D - Denial of Rehearing .....	A-103
APPENDIX E -	
Examples of Negative Commentary .....	A-104





## APPENDIX A

Supreme Court of Missouri  
en banc

No. 72022

In The Matter of:

GEORGE E. (BUZZ) WESTFALL,  
Respondent.

Filed: May 3, 1991

### ORIGINAL DISCIPLINARY PROCEEDING

This is an original disciplinary proceeding instituted by the Advisory Committee of the Missouri Bar pursuant to *Rule 5* against respondent George R. (Buzz) Westfall. The information charged respondent with violation of *Rules 8.2(a)* and *8.4(a)* and *(d)* of *Rule 4*, Rules of Professional Conduct, and requested that respondent be disbarred from the practice of law. The Court appointed as Master to hear the proceedings the Honorable Bruce Normile, Judge of the 2nd Judicial Circuit. Judge Normile made findings and recommended that respondent be suspended from the practice of law for one year and that the order of suspension be stayed subject to certain conditions. In a disciplinary proceeding the Master's findings, conclusions and recommendations are advisory in nature. This Court reviews the evidence *de novo*, determines independently the credibility, weight and value of the testimony of the witnesses, and draws its own conclusions of law. *In re Waldron*, 790 S.W.2d 456, 457 (Mo. banc 1990).

At all times relevant respondent served as prosecuting attorney of St. Louis County and as such was involved in a series of prosecutions of Dennis Bulloch for crimes committed in connection with the death of Bulloch's wife, Julia. Respondent first led the prosecution of Bulloch for murder in the first degree. Bulloch

was acquitted of that charge and found guilty of involuntary manslaughter. He was subsequently indicted on charges of armed criminal action and destroying physical evidence. The trial court denied Bulloch's motion to dismiss the indictment on grounds of prosecutorial vindictiveness and double jeopardy. Bulloch then filed petition for a writ of prohibition in the Missouri Court of Appeals, Eastern District, seeking to bar further prosecution of these charges. The court of appeals issued a preliminary rule in prohibition and subsequently made the writ absolute.

The court of appeals' opinion in the matter, the unanimous opinion of a three-judge panel of the court, was authored by the Honorable Kent E. Karohl. The court held first that the question of prosecutorial vindictiveness involved disputed facts, a matter to be considered on direct appeal if required. Relying on *Missouri v. Hunter*, 459 U.S. 359 (1983), the court also held that a subsequent trial of Bulloch for armed criminal action would constitute a violation of Bulloch's protection under the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States.<sup>1</sup> *Missouri v. Hunter* held that where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether these two statutes proscribe the "same" conduct, it does not violate double jeopardy to impose cumulative punishment under such statutes in a single trial. *Id.* at 679.

On the day the opinion was issued, respondent made remarks that constitute the basis of the information filed in this case. KSDK-TV, Channel 5, an NBC affiliate in St. Louis, broadcast

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<sup>1</sup> This Court granted transfer and made the preliminary rule absolute. *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989). The United States Supreme Court denied certiorari. *Missouri v. Bulloch*, 493 U.S. \_\_\_, 110 S. Ct. 718 (1990).

videotaped portions of an interview with respondent on the 6:00 p.m. and 10:00 p.m. news programs. Respondent's statement was broadcast as follows:

... The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.

. . . .

... but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.

. . . .

The decision today will have a negative impact on all murder one cases pending in Missouri, in the future in Missouri, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.

. . . .

But if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

The information filed by the Advisory Committee charges respondent with violating *Rules 8.2(a)* and *8.4(a)* and *(d)*, of Supreme Court *Rule 4*, Rules of Professional Conduct. *Rule 8.2(a)* provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

*Rule 8.4* provides in pertinent part:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of Professional Conduct . . . .
- (d) engage in conduct that is prejudicial to the administration of justice . . . .

The Advisory Committee submits that respondent reacted to Judge Karohl's opinion in utter disregard of the truth, of the integrity of the judicial process, and of respondent's obligations with respect thereto. The Committee further submits that respondent engaged in this conduct without investigation of the facts and without factual basis for his statements. The Committee briefed and argued additional violations not contained in the information. This Court will consider only those charges contained in the original information. *See Matter of Smith*, 749 S.W.2d 408, 414 (Mo. banc 1988).

## I.

In defense respondent contends that his statements were directed to the court of appeals' opinion and not to the qualifications or integrity of Judge Karohl and thus did not concern the qualifications or integrity of a judge. Respondent also asserts that the statements in question were merely the expression of opinion and, because opinion cannot be false, the statements are not proscribed by *Rule 8.2(a)*.

This Court first addresses respondent's protestations that his statements were merely expressions concerning the soundness of the court of appeals' decision, not statements of actual and provable facts about the judge's integrity. His contentions are not well taken. First, respondent stated that "the Supreme Court of the Land has twice said our armed criminal action statute is constitutional and that it does not constitute Double Jeopardy." Immediately following, respondent stated:

... but for reasons that I find somewhat illogical, and I think even a little bit less than honest, *Judge Karohl* has said today that we cannot pursue armed criminal action. *He* has really distorted the statute and I think convoluted logic to arrive at a decision that *he personally* likes.

(Emphasis added). Later followed this personalized language:

But if it's murder in the first degree and we're asking for death which, of course, is the most serious of all crimes, *Judge Karohl's* decision today says we cannot pursue both. And that, to me, really means that *he* made up *his* mind before *he* wrote the decision, and just reached the conclusion that *he* wanted to reach.

(Emphasis added.) The statements personalize the judge's conduct and specifically refer to him, his motivation, and his integrity as it relates to his participation in the appellate judicial process.

Respondent contends that his statements plainly reflect subjective opinion and not verifiable factual assertions. Because opinion cannot be "false," he argues, his comments are not proscribed by *Rule 8.2(a)*. In support of this position, respondent would have this Court microscopically examine the subject phrases independent of each other. He also would have this Court accept his after-the-fact characterization that his words, in sum, simply meant that the court of appeals opinion was "intellectually dishonest."

Respondent seeks to obfuscate the issue. He merely creates an “artificial dichotomy” between opinion and fact. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). In *Milkovich* the Court refused to recognize an artificial dichotomy between opinion and fact, relying instead on whether there was an assertion of objective fact:

If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’

*Id.* at 2705-06.

Respondent’s statements clearly imply an assertion of objective fact regarding Judge Karohl’s judicial integrity. The Master so found and this Court agrees. Respondent’s language at the very least implies that the judge’s conduct exhibited dishonesty and lack of integrity and is sufficiently factual to be susceptible of being proved true or false.

Respondent’s continued assertion that the statement “a little bit less than honest” was simply another way of saying “intellectually dishonest” is not well taken. This Court acknowledges but does not condone the all too frequent and often imprecise, rhetorical use of the term “intellectually dishonest.” In any event, in his attack on the judge respondent does not support his assignment of “dishonesty” by anything other than pointing to the long and tortuous history of armed criminal action in Missouri and expressing his assumption that a Missouri court was again in error. Respondent does not elucidate by suggesting, for



example, precedent or logic that he believes would constitute an "honest" opinion on the subject. He merely points to similar language and comments by other attorneys, including language used by some judges in dissenting opinions. It is not respondent's function, but the appropriate disciplinary committees', to initiate enforcement of the Professional Rules.

## II.

Respondent contends that construction of *Rule 8.2* or *8.4* so as to prohibit the comments made would violate both his right to free speech and his listeners' right to know as guaranteed by the First Amendment to the United States Constitution.

It is important to note at the outset that there are no bright lines to guide courts and lawyers in determining standards to impose when balancing the state's right and need to maintain public confidence in the administration of justice with a lawyer's first amendment rights. It is clear, however, that attribution of honest error to the judiciary is not cause for professional discipline. *In re Sawyer*, 360 U.S. 622, 635 (1959). It is also clear that lawyers who make derogatory statements about judges are protected by the First and Fourteenth Amendments to the United States Constitution from imposition of civil and criminal liability unless the statement is made "with knowledge of its falsity or in reckless disregard of whether it was false or true." *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964).

What is not clear is whether the same degree of constitutional protection afforded in the civil and criminal arenas is required in professional disciplinary proceedings. The United States Supreme Court has not directly addressed this issue, and the state courts are in disagreement. Many courts disregard a claim of first amendment protection in disciplinary proceedings, holding that free speech does not give a lawyer the right openly to denigrate the court in the eyes of the public. *See, e.g., In re Raggio*, 87 Nev.

369, 487 P.2d 499, 500 (1971). Other courts reject first amendment arguments in holding that an attorney's voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary. *See, e.g., In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. banc 1957) ("A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith."); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211, 214 (1972). A smaller number of courts hold that lawyers, even as participants in the administration of justice, are entitled to the full protection of the first amendment. *See, e.g., In re Hinds*, 90 N.J. 604, 449 A.2d 483, 489 (1982).

While the Supreme Court has not spoken decisively on the subject, there are several decisions by the Court that provide some guidance in determining standards by which to judge the proper role of the first amendment in disciplinary proceedings. In *Bradley v. Fisher*, 80 U.S. 335 (1872), the Court announced severe restrictions on the right of attorneys to criticize the judiciary: "[T]he obligation which attorneys impliedly assume . . . when they are admitted to the bar, [is to] maintain at all times the respect due to courts of justice and judicial officers. This obligation . . . includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Id.* at 355. The states reacted by codifying legal ethics, culminating in the American Bar Association's issuing the Canons of Professional Responsibility in 1908. Although the Canons demanded an attitude of respect toward the courts, they also recognized the importance of and encouraged attorney criticism of the judiciary. Most judicial decisions under the Canons, however, prohibited attorney criticism without regard to the actual effect of the statement on the public's



confidence in the legal profession. Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame L. Rev. 489, 491-92 (1981).

The Supreme Court next addressed sanctions against attorneys for allegedly disrespectful remarks about the judiciary in *In re Sawyer*, 360 U.S. 622 (1959). Sawyer was a defense attorney in a Honolulu trial of several people charged with conspiracy under the Smith Act. Six weeks after trial began Sawyer spoke at a meeting sponsored by the International Longshoremen's and Warehousemen's Union. Her speech was critical of the proceedings in Smith Act cases: "There is no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case." Upon recommendation of the Bar Association of Hawaii, the Supreme Court of the territory of Hawaii suspended Sawyer from the practice of law for one year for impugning the integrity of the trial judge. *Id.* at 626. The Ninth Circuit affirmed, 260 F.2d 189 (9th Cir. 1958), and the Supreme Court granted certiorari, 358 U.S. 892 (1958).

Justice Brennan wrote the four-judge plurality opinion reversing the Hawaii court. He began by noting that "lawyers are free to criticize the state of the law." *Sawyer*, 360 U.S. at 631. The freedom, however, does not include the right to "suggest any unseemly complicity by the judiciary in the practice." *Id.* at 633. The public attribution of honest error to the judiciary, wrote Justice Brennan, is no cause for professional discipline absent a tendency to obstruct the administration of justice. *Id.* at 635-36. The opinion delivered by Justice Brennan would prohibit only statements that tend to obstruct the administration of justice or impugn the integrity of a judge.

In a separate opinion Justice Stewart concurred in the result only because he found insufficient evidence in the record to support the charge that Sawyer impugned the integrity of the presiding judge. He emphasized, however, that he disagreed

with any intimation in the principal opinion that an attorney may invoke the constitutional right of free speech to immunize himself from even handed discipline for proven unethical conduct. *Id.* at 646 (Stewart, J., concurring). Justice Stewart adhered to the traditional notions of ethical considerations over freedom of speech: "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.* at 646-47.

Justice Frankfurter, joined by three other justices, dissented, finding that the record was replete with evidence to support the charge. He went on to address the "strong intimation" of the principal opinion that Sawyer's speech was protected by the first amendment. While Justice Frankfurter recognized that attorneys have certain first amendment rights to criticize judges, he maintained, however, that these rights did not extend to attorneys actively involved in pending litigation:

Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.

*Id.* at 666, (Frankfurter, J., dissenting). Focusing on the potential effect of such speech, Justice Frankfurter's opinion apparently would ban all critical speech by attorneys relating to pending litigation. Comment *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Law Beware*, 15 N. Ky. L. Rev. 129, 136 (1988).

The Court shed further light in *Garrison v. State of Louisiana*, 379 U.S. 64 (1964). Garrison, district attorney of Orleans Parish, Louisiana, was convicted of criminal defamation for statements made at a press conference which disparaged the judicial conduct of eight judges of the Criminal District Court of the parish.

The Court first held that the *New York Times* rule applied in criminal as well as civil actions. This rule provides that critics of public officials may not be subjected to civil sanctions unless the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The *Garrison* court held that "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." *Garrison*, 379 U.S. at 74.

These cases and others make clear that speech concerning public officials, including judges, may be protected speech, "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74-75. See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (A primary purpose of the first amendment is to protect the free discussion of governmental affairs, including the operations of the courts and the judicial conduct of judges.). The principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" is no less important when the judiciary is involved. *Garrison*, 379 U.S. at 75, quoting *New York Times*, 376 U.S. at 270.

There are limitations, however, to first amendment protection. Even protected speech may be regulated. Where unbridled speech amounts to misconduct that threatens a significant state interest, the state may restrict a lawyer's exercise of personal rights guaranteed by the Constitution. See *NAACP v. Button*, 371 U.S. 415, 438 (1963). Restrictions on free speech, however, will survive judicial scrutiny only if the limitation furthers an important or substantial governmental interest and is no greater than necessary or essential to the protection of the particular governmental interest involved. *Sable Communications of California*,

*Inc. v. F.C.C.*, 492 U.S. 115 (1989). A determination of whether the conditions have been met necessarily requires a balancing process. See *L. Tribe, American Constitutional Law* § 12-2, at 792-93 (2d ed. 1988). The Court balances the competing considerations of the individual's interest in expressing certain ideas against the government's interests in and justifications for restricting such expression. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-65, *reh'g denied*, 434 U.S. 881 (1977).

In undertaking the weighing process, it is necessary to evaluate the nature and importance of the interest of the state sought to be advanced through the restriction of expression. It is clear that the state has a substantial interest in maintaining public confidence in the administration of justice. The interest is not only the litigant's but also the public's. The interest is in the administration of justice by a fair and impartial judiciary. The right to remedy by appeal is part of this system. Consequently, the public's confidence in the appellate process is vital.

Lawyers are an integral part of and essential to the administration of justice. As officers of the court, lawyers do not stand in the shoes of ordinary citizens. See *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) ("The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries . . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"). Lawyers must execute their professional responsibilities ethically and pursuant to rules, carefully considered, in order to ensure the confidence of both litigants and the public. Statements by a lawyer impugning the

integrity and qualifications of a judge, made with knowledge of the statements' falsity or in reckless disregard of their truth or falsity, can undermine public confidence in the administration and integrity of the judiciary, thus in the fair and impartial administration of justice.

*Rule 8.2(a)* contemplates and seeks to effect the substantial government interest in administration of justice through a fair and impartial judiciary. It is this substantial state interest that guides this Court in its interpretation of *Rule 8.2(a)*. The comments to the rule also recognize, however, that the public's interest in the proper administration of justice may be served through criticism of the process. The rule, then, is sensitive to the possibility of its chilling effect and will not be interpreted to silence all lawyer criticism of the judicial system. Discipline, if imposed, is imposed not as punishment against the offender, but in protection of the public. *In re Hardge*, 713 S.W.2d 503, 505 (Mo. banc 1986).

Further construction of *Rule 8.2(a)* requires that the term "false or with reckless disregard as to its truth or falsity" be defined. The cases have consistently required subjective knowledge of the falsity of one's statement before sanctions were imposed. There is no one infallible definition of "reckless disregard." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). The standard has often been defined as an awareness of the likelihood of the circulation of false information or a high degree of awareness of probable falsity. See, e.g., *id.* at 731. In defamation actions the standard has consistently been a subjective one — the test not being whether a reasonably prudent person would have had serious doubts as to the truth of the publication, but whether the defendant in fact entertained such doubts. *Id.*

It is not clear, however, whether the "with knowledge or in reckless disregard" standard used in defamation cases must be



strictly applied in disciplinary proceedings. *But see Garrison*, 379 U.S. at 73 (“Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.”). Some courts have simply refused to apply the *New York Times* test, holding that it was inapplicable to a disciplinary proceeding. *See Matter of Johnson*, 240 Kan. 334, 729 P.2d 1175, 1180-81 (1986); *Matter of Terry*, 271 Ind. 499, 394 N.E.2d 94, 95 (1979), *cert. denied sub nom.*, *Terry v. Indiana Supreme Court Disciplinary Comm’n*, 444 U.S. 1077 (1980). Other courts have in dicta indicated that the *New York Times* test is applicable in disciplinary proceedings. *See Eisenberg v. Boardman*, 302 F. Supp. 1360, 1362 (W.D. Wis. 1969); *State Bar v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. App. 1974). Some courts appear to apply the *New York Times* test, but it is unclear whether they are applying the same subjective “with knowledge or in reckless disregard” standard. *See, e.g., Ramirez v. State Bar of California*, 28 Cal.3d 402, 169 Cal.Rptr. 206, 619 P.2d 399, 404 (1980).

At least one court has directly addressed the question and concluded that an objective rather than subjective standard should be used. *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.), *cert. denied sub nom. Graham v. Wernz*, 111 S. Ct. 67 (1990). *See also Louisiana State Bar Ass’n v. Karst*, 428 So.2d 406, 409 (La. 1983). In *Graham* the Supreme Court of Minnesota held that the proper standard in attorney discipline cases “must be an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. *Id.* at 322. Minnesota’s rule is identical to this Court’s *Rule 8.2(a)*, and also identical to *Rule 8.2*, American Bar Association Model Rules of Professional Conduct. The *Graham* court noted that *Rule 8.2(a)*, on its face, rejects an absolute privilege for false statements made by a lawyer with reckless disregard for the falsity. The court noted that the rule’s language itself is consistent with the consti-

tutional limitations placed on defamation actions by the United States Supreme Court cases of *New York Times* and *Garrison*. *Id.* at 321. The court concluded, however, that because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. *Id.* at 322. Citing the differences between defamation (a personal wrong with a personal redress) and professional discipline (redress of a public wrong) the court decided that attorneys should be held to a higher standard when leveling criticism that may adversely affect the administration of justice.

This court certifies attorneys for practice to protect the public and the administration of justice. That certification implies that the individual admitted to practice law exhibits a sound capacity for judgment. Where an attorney criticizes the bench and bar, the issue is not simply whether the criticized individual has been harmed, but rather whether the criticism impugning the integrity of judge or legal officer adversely affects the administration of justice and adversely reflects on the accuser's capacity for sound judgment. An attorney who makes critical statements regarding judges and legal officers with reckless disregard as to their truth or falsity . . . exhibits a lack of judgment that conflicts with his or her position as "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Minn. R. Prof. Conduct, Preamble.

*Id.* This Court agrees with the reasoning and holding of the *Graham* court. The objective standard survives first amendment scrutiny in light of the compelling state interests served.

It remains to determine whether respondent violated the rule. The findings and conclusions of the Master stated that respondent did in fact act with reckless disregard as to the truth or falsity of the statements made regarding Judge Karohl. This Court agrees. When asked about the statement that the judge "made up

his mind before he wrote the decision,” respondent testified that he meant “that he’d made up his mind before he got the case,” and that his intent was to convey the message that he felt Judge Karohl’s opinion was a foregone conclusion. As stated above, respondent asserted that he meant that the opinion was “intellectually dishonest” but when asked to explain how the opinion was dishonest, respondent merely referred again to his view that the “Missouri appellate system has been intellectually dishonest concerning armed criminal action from day one, in that they steadfastly refuse to follow the directives of the highest court in the land . . . and I anticipated the same thing would happen again.” Before making these statements about Judge Karohl, respondent failed to investigate to determine whether Judge Karohl had participated in any cases involving the armed criminal action issue, authored any opinions on the subject, or expressed any personal opinions about it.

Without any corroborative evidence, respondent accused Judge Karohl of deliberate dishonesty. He accused the judge of purposefully ignoring the law to achieve his personal ends. His was not an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests. That respondent now seeks to negate the Master’s findings and conclusions by saying that respondent meant only to characterize the court of appeals opinion as being “intellectually dishonest” refutes neither the actual language used by respondent at the press conference nor respondent’s failure legitimately to criticize the reasoning and the holding of the court of appeals opinion. Without investigation, however, and knowing the court’s inability to respond to accusations of unspoken motive, respondent proceeded to make a publicly televised statement alleging purposefully dishonest conduct. Respondent’s conduct reflects a reckless disregard for the truth or falsity of the statements made. This Court has already concluded, *supra*, that respondent’s statements imputed lack of integrity and misconduct in the judge’s professional work. His



statements were without basis; the court of appeals opinion relied on the teaching of *Missouri v. Hunter*. Respondent's conduct was prejudicial to the administration of justice and reflects adversely on respondent's fitness to practice law. Accordingly, this Court now finds that by reason of this conduct, the respondent violated *Rule 8.2(a)* of the Rules of Professional Conduct.

This Court must now assess an appropriate disciplinary sanction by reason of the misconduct found in this case. Respondent argues that as an elected public official, he was using the only practicable means of communicating with his constituents. It is true that public figures and those speaking on public matters should not be held in fear of retribution for their every word. Respondent is nevertheless subject to the Rules of Professional Conduct and does not enjoy a privilege recklessly to impugn before the public the integrity of the judiciary. While deference is given to the needs of public officials to be free from a chilling effect, the mere holding of public office does not exempt a lawyer from the operation of the Rules of Professional Conduct. Respondent notes that he did not engage in bribery of jurors, subornation of perjury, misrepresentation to a court, or any similar kind of conduct. This is correct. Furthermore, this Court independently notes that respondent did not accuse the judge of criminal conduct or of being subject to inappropriate influence.

The Master noted that respondent has privately stated his belief in the judge's personal integrity and that at the committee hearing respondent reported that he had privately apologized to Judge Karohl before the hearing. The Master found this to be a mitigating circumstance but noted as an aggravating circumstance respondent's failure to make similar public apology and thereby alleviate the damage caused to the court of appeals and the judge. There are other aggravating circumstances. At the time respondent made the statements, the case remained pending. See *Nelson*, 210 Kan. 637, 504 P.2d 211, 215 (1972).

Avenues for complaint were available in the form of a motion for rehearing as well as through the filing of a complaint with the Commission on Retirement, Removal and Discipline. See *Matter of Riley*, 691 P.2d 695, 705 (Ariz. banc 1984); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979). To date, respondent has continuously and steadfastly refused to deviate from his original position, even in the light of subsequent legal proceedings, none of which disturbed either the holding or the reasoning of the court of appeals opinion. As the Master noted, respondent's twenty years' experience as a prosecutor "belies any suggestion that he may have acted inadvertently or mistakenly, but rather that he did so knowingly or recklessly of the damage he would cause. The only apparent conclusion is that the very unusual and sensational aspects of the case afforded him an opportunity of personal publicity and self-aggrandizement which he utilized without reflection upon the serious consequences entailed."

This Court recognizes that it is possible for a lawyer to charge a judge with misconduct more egregious than that charged in the present case. This Court also recognizes that this case involves a matter of first impression and initial construction of *Rule 8.2(a)* and that the purpose of the rule is to protect the public. Under these circumstances, a public reprimand is appropriate.

The charges brought under *Rule 8.4* are encompassed within the violation of *Rule 8.2(a)* in this case and, for purposes of imposition of discipline, cannot be distinguished.

Respondent is reprimanded and directed to pay the costs of these proceedings.

/s/ Ann K. Covington, Judge

Robertson, Rendlen, Higgins, and  
Holstein, JJ., concur; Seiler, Sr. J.,  
concur in separate opinion filed;  
Blackmar, C. J., dissents in separate  
opinion filed. Billings, Jr., not sitting.

SUPREME COURT OF MISSOURI

en banc

No. 72022

In the Matter of:

GEORGE E. (BUZZ) WESTFALL,

Respondent.

Filed: May 3, 1991

CONCURRING OPINION

In my opinion, there is no question but that Mr. Westfall in his television interview maliciously or recklessly made a false statement that Judge Karohl wrote his *Bulloch* opinion to satisfy his own personal views, using less than honest reasons to do so (which opinion, incidentally, in its result necessarily exposed Mr. Westfall's ignorance of the law of double jeopardy, no doubt thereby arousing his pique).

Mr. Westfall's self-serving protestations that he had "respect for Judge Karohl", did not question his personal integrity "in the least" and had never intended to "impugn or question Judge Karohl's personal integrity," made months later, only after disciplinary charges had been filed against him, in no way change the spirit behind what he said about Judge Karohl in the television interview.

Clearly, under any test, Mr. Westfall's conduct is a violation of Rule 8.2(a) for which he deserves discipline. None of the many cases cited in the opinions herein would require otherwise.

My belief is that it is not necessary or desirable to reach any conclusion in this case as to whether the same degree of constitutional protection afforded speech in civil and criminal cases is required in lawyer disciplinary cases.

I concur in the judgment of discipline by reprimand.

/s/ROBERTE. SEILER, Senior Judge

SUPREME COURT OF MISSOURI  
en banc

No. 72022

In the Matter of:

GEORGE E. (BUZZ) WESTFALL,  
Respondent.

Filed: May 3, 1991

**DISSENTING OPINION**

We should proceed very carefully when we are asked to censor or to censure political speech. Words spoken about an opinion by a judge who is subject to the periodic scrutiny of the voters, by an elected prosecuting attorney and potential candidate, relating to an important criminal matter, epitomize political expression.

The words were spoken during an interview with a television reporter. These reporters fire streams of questions, using the responses they deem most newsworthy. These are often the most vivid.<sup>1</sup> Such give and take is a part of the political process, and should not be discouraged by the threat of hypercritical scrutiny.

The interview came the day the criticized opinion was handed down. The respondent was entitled to share his overview of the course of decisions, without detailed legal research, before he spoke with the reporter. Nor was he required to withhold comment until the motion for rehearing was disposed of. An opinion is news when it is handed down. Motions for rehearing

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<sup>1</sup> The principal opinion faults the respondent for asking us to "microscopically examine the subject phrases independent of each other," even though the broadcast consisted of disjointed segments selected by the editors rather than a continuous discourse.

are usually formalities, often sought but seldom successful.<sup>2</sup> There is absolutely nothing in the record indicating that the respondent was trying to bring public pressure on the author of the opinion, or the other judges of his court, to grant a rehearing. He rather assumed a martyred pose in suggesting that the bench was not sympathetic to his aims.

In *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972) the Supreme Court of Kansas declined a request for discipline of an attorney who had criticized a decision of that court, disciplining him, when he was approached by an interviewer shortly after the handdown. The court perceived a "situation replete with emotion and acrimony," and noted "the fact that the statements attributed to the respondent, were generally in broad terms." *Id.* at 217. It took the very practical course of dismissing the petition. It would be wise for us to do likewise.

I do not argue that a prosecuting attorney enjoys superior privileges with regard to political speech. His office simply demonstrates the political nature of his speech. Like rights are necessarily available to his critics. Nor do we have to speculate at this point as to whether a lawyer's privilege of comment is greater in a case involving important public interests than in matters of purely private concern.

At the formal hearing before the Advisory Committee the respondent testified as follows:

MR. SCULLY: Mr. Westfall, do you think in this particular instance that you could have criticized the opinion of the Appellate Court in a different fashion?

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<sup>2</sup> The motion for rehearing, of course, is a condition precedent to further review. *Rules* 84.17, 83.03.

A. Sure. I told Judge Karohl this before we came in here, I saw him and I did something I've been wanting to do but I don't see him often, I went over to say good morning to him and if he seemed okay to shake his hand. I said Judge, I want to say to you face-to-face, not to influence the outcome of this hearing but we're here, I did not mean to impugn [sic] or to question your personal integrity and I feel badly if that's the inference you drew or your family or some of your friends or colleagues have drawn. My purpose was to criticize the opinion, I still feel it was wrong, I still feel I have the right and obligation to my constituents to say those things and I'll again given a similar situation I may be a bit more cautious to not reflect upon one's personal integrity but that's a tough thing to do and he sort of made it clear that he understood that dealing with the media is tough because they put on what they want to put on so I made that clear to him.

The disposition of this case is solely our responsibility. We owe no deference to any other tribunal. We are the fact finder. There are no significant credibility calls in the master's report, and I find no indication that he did not consider the respondent to be a credible witness. We must also eschew forbidden intrusions on the field of free expression. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

A public reprimand is a substantial sanction, which must be administered only in accordance with due process of law. *In re Voorhees*, 739 S.W.2d 178, 180 (Mo. banc 1987), citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 636-37 (1985). The reprimand is a scar on the lawyer's record and, in a case impacting the First Amendment, has an obvious chilling effect on further expression. We are not at liberty to give a lawyer a "chewing" for rudeness or insolence not committed in the presence of the court.



The judgment of reprimand is faulty, first because no violation of Rule 8.2 has been established; second, because the respondent's speech is protected under the First Amendment and Art. I, Sec. 8, of the Missouri Constitution; and, third, because of the oppressive conduct of the Advisory Committee.

### 1. *There is no Rule Violation*

Rule 8.2 is narrowly drafted, virtually in terms of the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There may be no discipline except for a

statement that the lawyer knows to be false or with reckless disregard of its truth or falsity concerning the qualifications or integrity of a judge.

The rule pointedly makes no reference to disrespect, discourtesy, or similar impropriety. It is directed at calumny; not at indiscreet or extravagant expression. See *Seested v. Post Printing & Pub. Co.*, 326 Mo. 559, 31 S.W.2d 1045, 1052 (1930); *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 135 S.W. 6, 9 (1911); *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367, 369 (Mo. App. 1973). The evidence does not demonstrate knowing or reckless falsehood as the rule requires.

The most offensive part of the interview states, "for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl . . ." Elementary grammar teaches that what the respondent suggested were "a little bit less than honest" were the reasons, not the judge. Any contrary conclusion is a distortion of his language. The coupling of the offensive phrase with "illogical" is a further demonstration that the respondent is commenting on the reasons.

The principal opinion seeks to bolster its construction by at least six unsupportable paraphrases of the respondent's actual words. He did not "specifically refer to [the judge's] . . . integrity



as it relates to his participation in the appellate judicial process.” There is no “assertion of objective fact regarding Judge Karohl’s judicial integrity.” There is no implication “that the judge’s conduct exhibited dishonesty and lack of integrity . . . .” The statements that respondent “accused the judge of purposefully ignoring the law to achieve his personal ends” or implied “a deliberate, dishonest, conscious design on the part of the judge to serve his own interests,” or that his statements “imputed lack of integrity and misconduct in the judge’s professional work,” are the words of the writer, not the words of the respondent. This treatment of his words highlights the danger in seeking discipline for expressions about public matters and will give great concern to any lawyer, whether holding office or not, or to any law professor who values a law license, about any criticism of a judge or a judicial opinion. “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The United States Supreme Court has frequently reiterated its holding that speech on matters of public concern occupies the “highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation omitted). See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Judge Karohl himself apparently did not think that he had been accused of dishonesty. He testified as follows:

In my present opinion of his words this is a criticism of our opinion.

\* \* \*

Q. Well, you know from talking to Mr. Westfall that he certainly meant to criticize your opinion; isn’t that correct?

A. I haven’t any doubt he was criticizing the opinion from taking all of the words he used.

The principal opinion makes much of the use of "Judge Karohl" rather than "the court." This is hardly a significant or substantial distinction, in view of our practice, along with almost all American collegial courts, of speaking through opinions prepared by one member and bearing the author's name. The later use of the name and of the singular personal pronouns does not, by any reasonable construction, convert a statement about the reasons in an opinion to a statement about a judge's integrity.

Other portions of the interview simply charge that the opinion is result oriented. This assertion is frequently made about judicial opinions, and cannot be found to be a statement of fact. As Justice Holmes was fond of pointing out, judicial opinions are impacted by the judges' inarticulate major premises.<sup>3</sup> Members of the public have the right to comment about their perception of these premises. Some judges may be branded "plaintiff minded," others are "tools of the insurance companies." Some are "law and order" to one segment of the public but "hanging judges" to others. Some are said to be "tyrants;" others "wimps." Characterizations such as these are not the subject of discipline. Nor is there vice in the statement about what the judge "personally likes." All judges have notions about the shape the law should take and hope that their views find favor with their colleagues.

Least supportive of all of the discipline imposed is the statement that "he made up his mind before he wrote the decision, and just reached the conclusion he wanted to reach." Judge Karohl testified that he was one of the members of a writ division which voted to issue a preliminary order in prohibition. Extraordinary writs are grudgingly issued in Missouri, and a judge who votes to issue a preliminary order very likely has a rather strong feeling that relief should be granted. Tentative views are subject to further briefing and oral argument, but writs to stop criminal

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<sup>3</sup> *Lochner v. People of State of New York*, 198 U.S. 45, 76 (1905).

cases are so rare that, when one is issued, the prosecutor has reason for apprehension. The respondent's realistic analysis of the decisional process does not demonstrate a knowing or reckless falsehood.

The historical development of the Missouri law of libel is helpful in demonstrating how allegedly defamatory words should be construed. In many cases over the years it is said that a plaintiff will not be allowed to place a strained and unnatural construction on language in order to support a claim of libel. *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 135 S.W. 6, 9 (1911); *Thomson v. The Kansas City Star Co.*, 387 S.W.2d 493, 498 (Mo. banc 1965) and *Jacobs v. Transcontinental & Western Air*, 358 Mo. 674, 216 S.W.2d 523, 525 (1948). Innuendo is permissible only if it is fairly supported by the actual words. *Langworthy v. Pulitzer Pub. Co.*, 368 S.W.2d 388, 389 (Mo. 1963); *Swafford v. Miller*, 711 S.W.2d 211, 213-14 (Mo. App. 1986). The principal opinion uses phrases such as "respondent's statements clearly imply" and "respondent's language at the very least implies." To speak in this manner is to concede that the respondent's words do not say what the prosecution would have them say. There is no reason why defamation cases, even though serving a somewhat different purpose, should not be helpful when problems of construction are presented in a disciplinary case.<sup>4</sup>

Missouri, furthermore, has always recognized the distinction between defamatory statements of fact and statements of opinion, not grounded in objective fact. *Henry v. Halliburton*, 690 S.W.2d 775, 786-87 (Mo. banc 1985); *Willman v. Dooner*, 770 S.W.2d 275, 278 (Mo. App. 1989). We respect people's right to express their views, especially on matters of public concern. *Henry v. Halliburton*, 690 S.W.2d at 784-85 (published column

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<sup>4</sup> See *Swafford v. Miller*, 711 S.W.2d 211, 213 (Mo. App. 1986).

and subsequent copy calling life insurance agent, identified in broad terms, "fraud" or "twister" an expression of opinion and not actionable); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 499 (Mo. App. 1980) (remark that lawyer engaged in "sleazy" dealings an expression of opinion and not actionable); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970) (use of term "blackmail" in characterizing negotiating position of public figure securing zoning variances was neither slander nor libel). The principal opinion asserts that the respondent "seeks to obfuscate the issue" by suggesting a distinction between fact and opinion, quoting from the case of *Milkovich v. Lorain Journal Co.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2695 (1990). With due respect, the obfuscation comes from the principal opinion.

In *Milkovich*, a newspaper published an editorial in which it was strongly intimated that the plaintiff and others had perjured themselves at a public hearing. The Supreme Court said simply that defamatory statements of fact might support a judgment for libel, even though they were prefaced by a phrase such as "in my opinion," if the speaker suggests personal knowledge of the defamatory facts stated. This case is entirely different, for lack of tangible statements of fact. *Milkovich* is consistent with *Restatement (Second) of Torts*, § 566 (1965), with the general principles of Missouri Law as exemplified by our decisions, and with prior Supreme Court cases, which it cites at length. It certainly does not require this Court to abandon the historic distinction between statements of fact and statements of opinion. "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 110 S. Ct. at 2706 (citation omitted). If we were to abandon the historic distinction we would reject the wisdom of decades.

The proof is also deficient in the required showing that the statement was one which "the lawyer knows to be false or [was made] with reckless disregard of its truth or falsity." Rule 8.2

requires a purpose to cause harm through defamation. See *New York Times*, 376 U.S. at 279-83, and Part 2, *infra*. There is no support for a finding that the respondent had any purpose other than to denounce the opinion. Counsel for the informants, in response to my question at oral argument, said that their strongest case is *In re Sawyer*, 360 U.S. 622 (1959), which the principal opinion discusses at length. For reasons that follow in Part 2, *infra*, the case does not give any support to the result.

Nor is there support for the claim that the statement was “knowingly or recklessly made.” “Recklessness” as applied to speech is not the equivalent of “popping off.” There must be an intent to injure before there is occasion for the determination of recklessness. There is no showing here of “false statements made with the high degree of awareness of their probable falsity” required by *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), discussed in Part 2, *infra*.

Because we are the fact finder, we should not disregard the respondent’s testimony. He agreed that he should have spoken more carefully, and said that other portions of the interview which the newspeople did not see fit to air made his purpose clearer. He stated positively that he had no purpose of questioning the judge’s integrity and that he should have phrased his comments in a different way. Distinctions based on whether he said “the court” rather than “Judge Karohl,” or “intellectually dishonest” rather than “a little bit less than honest,” show no more than negligence, and do not establish recklessness by the standard the law requires. *Garrison v. Louisiana*, 379 U.S. at 79.

No case cited in the principal opinion involves facts even close to this one. Several of the cases cited have assessed discipline when a lawyer has made unequivocal statements charging one or more judges, or judges acting in concert with others, of fraud, corruption or conspiracy in the disposition of particular cases. *Matter of Terry*, 271 A. 499, 394 N.E.2d 94 (1979); *Ramirez v.*

*State Bar of California*, 28 Cal.3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980); *Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406 (La. 1983); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.) cert. denied sub nom. *Graham v. Wernz*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 67 (1990). These cases are similar to our own opinion in *Matter of Alexander*, \_\_\_ S.W.2d \_\_\_ (Mo. banc 1991) (No. 73107, decided April 9, 1991), which properly points to the need for protecting the public from a lawyer who makes unfounded accusations for which no support is furnished, even though the lawyer, out of paranoia or other eccentricity, may believe the charges to be true. All involved unsupportable false charges of criminal or conspiratorial conduct, and do not support the holding of this case.

I would commend the approach of such cases as *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974); *State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958 (Okl. 1988); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); and *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211 (1984), in which the courts have recognized that discipline for speech should not lightly be decreed.

I do not admire the respondent for speaking as he did. His remarks could be described as intemperate, disrespectful, discourteous, poorly informed, and with a plethora of similar adjectives. He is an ambitious politician with a penchant for publicity. Perhaps he had a defense reaction to the disappointing verdict in a major case. The informants must still demonstrate violation of a narrowly drawn rule.



## 2. *The First Amendment Issue*

The respondent places prime reliance on the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that even false statements are subject to constitutional protection in defamation actions if they concern public issues and public figures. The defamation plaintiff must show malice, which may be found if a false and defamatory statement is wilfully or recklessly made. *Id.* at 279-80. This holding introduces a new element into the law when it is sought to impose sanctions on expression. The holding was made applicable to criminal cases in *Garrison v. Louisiana*, 379 U.S. at 67, 74, demonstrating that the rationale and holding of *New York Times* apply with no less force when the remedy is criminal.

The principal opinion suggests, however, that

What is not clear is whether the same degree of constitutional protection afforded in civil and criminal arenas is required in professional disciplinary proceedings.

The answer, I submit, is quite clear. Lawyers do not surrender their First Amendment rights when they accept their licenses. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re R.M.J.*, 455 U.S. 191 (1982); reversing *Matter of R.M.J.*, 609 S.W.2d 411 (Mo. banc 1980). *NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978). These cases demonstrate that First Amendment rights must be respected in disciplinary actions, and put a substantial burden on the states to show compelling public interest in order to support limitations on freedom of expression. There must be narrowly drawn rules to protect a compelling public interest. The principal opinion suggests that the public interest involved in disciplinary actions supports stricter controls over freedom of expression. *Garrison* refutes this claim, because it too involved the vindication of public rights rather than private rights. Professional discipline

can be fully as chilling of expression as can criminal prosecution.<sup>5</sup>

The principal opinion adduces scanty and obsolescent authority for the proposition that the First Amendment does not apply to, or has limited application to, lawyer discipline cases. Some of the cases are pre-*New York Times* and most are pre-*Bates*. The more recent and better considered cases recognize that First Amendment protection applies with full force.<sup>6</sup> The quotation from our case of *In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. banc 1957) must be read in the light of the numerous intervening Supreme Court decisions demonstrating that courts are seriously limited in sanctioning lawyers for what they say, and that disciplinary rules must consist with the First Amendment.

\* *Bradley v. Fisher*, 80 U.S. 335 (1871), decided in interesting historical context, is of no help at all in our present inquiry because it dealt with a personal confrontation between a lawyer and a judge during a recess in a trial. The case involved a damage suit by a lawyer against a judge and presented several issues, none germane to the present inquiry.

The principal opinion finds solace in a Minnesota case, *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.), cert. den. sub nom *Graham v. Wernz*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 67 (1990), which is said to present an "objective" rather than a

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<sup>5</sup> In *Gentile v. State Bar of Nevada*, 106 Nev. 60, 787 P.2d 386 (1991), the Supreme Court of Nevada tried to one-line the First Amendment issue in a disciplinary action involving a lawyer's public statement of his client's innocence of pending charges. The Supreme Court granted certiorari and the case has been argued.

<sup>6</sup> *State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958 (Okla. 1988); *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211 (1984); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974).



“subjective” test for the element of knowing and reckless falsehood in disciplinary cases. There a lawyer who lost a case charged the presiding judge with conspiring with others to deprive his client of his rights. At his disciplinary hearing he offered no evidence in support of the charges, but sought to defend on the basis that he believed the charges to be true. The court held that his professed belief could not refute the charge of recklessness. The case is in line with cases cited in Part 1, above, in which lawyers have been disciplined for charging judges with criminal or conspiratorial conduct, and with our recent case of *In re Alexander, supra*, but bears not the slightest similarity to this case.

Lawyers possess First Amendment rights. Before a court can legitimately impose discipline, chilling the First Amendment, the state must articulate a compelling interest. This the Advisory Committee has not done.

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978), the Court held that the state’s interest in maintaining the confidentiality of judicial disciplinary proceedings did not justify a sanction against a newspaper which published an article about pending proceedings. This also emphasizes that lawyer and judicial discipline must be exercised in a manner consistent with the First Amendment.

Pertinent also is the trilogy of *Bridges v. State of Cal.*, 314 U.S. 252 (1941); *Pennekamp v. State of Fla.*, 328 U.S. 331 (1946); and *Craig v. Harney*, 331 U.S. 367 (1947), in which the Court established a rule that a purpose of maintaining respect for the courts does not justify contempt sanctions such as have been fairly common in the past for criticism of a judge’s conduct in a pending case. The Court explained that the right of freedom of speech includes the right to criticize courts. The trilogy suggests that judges must have thick skins and do not require protection from criticism unless there is malicious defamation. First

Amendment interests far outweigh a purpose of "maintaining respect for the courts." *See also Cohen v. California*, 403 U.S. 15, 22-26 (1971).

The Advisory Committee failed to prove that the statement was one which "the lawyer knows to be false or [was made] with reckless disregard of its truth or falsity." Rule 8.2 is embodied in the *New York Times* standard for proving defamation. *New York Times*, 376 U.S. at 279-80. Actual malice denotes a purpose to cause harm through defamation. *Id.* at 279-83.

The principal opinion points out that the respondent testified at the formal hearing that he did not mean to impugn the integrity of Judge Karohl, and that he did not believe, and did not mean to suggest, that the judge was not honest. The informants, incredibly, use this testimony as evidence that he knowingly spoke falsehoods when only a loose tongue is indicated. The principal opinion does not appear to go this far, but seizes on his admissions as indication that he acted "with reckless disregard as to the truth or falsity of the statements . . . ." In so holding, the opinion misses the point of the requirement of scienter.

Contrary to the Committee's position, *In re Sawyer*, 360 U.S. 622 (1959), provides no support for the principal opinion's remarkable conclusion that respondent spoke knowing falsehoods. A majority of the justices found that Sawyer was not charged with and could not be found to have attempted to obstruct the proceedings in an ongoing trial. The majority went on to conclude that her statements, which are much more disparaging and inflammatory than anything in this case, could not properly be construed as a personal attack on the single judge who was hearing the case. The four dissenters called for more deference to the findings of the two lower courts, and suggested that counsel in a pending trial had special responsibilities. The case, far from supporting the discipline imposed here, is at war with the present result.

The principal opinion struggles to find “recklessness,” saying:

It is not clear, however, whether the “with knowledge or in reckless disregard” standard used in defamation cases must be strictly applied in disciplinary proceedings.

*Garrison and St. Amant v. Thompson*, 390 U.S. 727 (1968), provide the answer. Lawyers may not be disadvantaged in their political speech except for compelling reasons.

Respondent’s “recklessness” is apparently found in his failure to think things through or to study the case law. But recklessness in First Amendment law is a term of art, not to be casually attributed. In *Garrison*, the Court said, “it is essential that the First Amendment protect some erroneous publications.” *Garrison v. Louisiana*, 379 U.S. at 74. “Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.” *Id.* at 73. The United States Supreme Court has explained that in cases concerning public figures and matters of public interest

reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts as to the truth of his publication*. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. (Emphasis supplied).

*St. Amant v. Thompson*, 390 U.S. at 731 (1968). That case also teaches the negligent failure to investigate does not establish recklessness. *St. Amant v. Thompson*, 390 U.S. at 733. See also *Cervantes v. Time, Inc.*, 330 F. Supp. 936, 938 (E.D. Mo. 1971).

The principal opinion fails to demonstrate that the respondent's utterances meet the standards of *St. Amant* and *Garrison*.<sup>7</sup>

Our own jurisprudence also teaches that recklessness is not lightly to be found. *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo. banc 1977), Seiler, C. J. There a St. Louis alderwoman stated at a meeting of the Board that she had had two abortions. Her name was correctly telephoned to the city desk by a reporter, but the rewrite editor substituted the name of another alderwoman while "working on a deadline." This Court set aside a verdict for the plaintiff, holding that the jury could not properly find reckless conduct under the evidence in the case and because there was no "high degree of awareness on [the editor's] part of probable falsity in what he wrote." *Id.* at 861.

Today this Court fails to heed the federal decisions defining recklessness. In assigning an unwarranted construction to Rule 8.2, the Court commits the classic First Amendment sin of overbreadth. If lawyers are subjected to the whims of particular tribunals, and are unable to determine the limits of their freedom of expression, their protected expressions will be seriously impeded.<sup>8</sup>

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<sup>7</sup>I find astounding the intimation that the respondent should have made any kind of report to the Committee on Retirement, Removal and Discipline, when he stated emphatically that he did not assert or imply any suggestion of judicial misconduct.

<sup>8</sup>See *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2568 (1987) (invalidating rule which proscribed all First Amendment activities in airport terminal); *Marsh v. Alabama*, 326 U.S. 501 (1946) (trespass statute held not enforceable against distribution of religious literature on streets of company town).

Traditionally, it is the function of courts to define the constitutional and permissible contours of a rule, regulation or statute. Today, however, it is the judiciary, painting with a broad brush, that intrudes on the narrow boundary of a rule already defined through years of Supreme Court jurisprudence.

The *New York Times* principle and the cases applying it represent good law and good policy. Our bill of rights embodies the same values as does the First Amendment. We should not strive for minuscule distinctions in order to discipline a lawyer for speech. The *New York Times-Garrison* principles amply protect the public from defamatory statements by lawyers about judges. We should proceed in the tradition of free speech, which our courts have honored so long.

### 3. *The Actions of the Advisory Committee*

There is another reason why the proceeding should be terminated without discipline. The Advisory Committee sought to bring the matter to an end after the formal hearing by tendering the respondent a written admonition pursuant to Rule 5.13. This tender necessarily indicated that the Committee was of the opinion that his conduct did not require either suspension or disbarment. Had it concluded that a temporary or permanent separation from the practice was required in the public interest, its offer of a mere admonition would be manifestly irresponsible.

The respondent refused the admonition in a courteous letter stating that "I . . . feel strongly that my conduct was not only professional, but appropriate." This he had the perfect right to do.<sup>9</sup> An admonition is not a trivial matter. It could be used in future disciplinary proceedings.<sup>10</sup> The respondent might believe that, if he accepted the admonition, he would be considered a "prior offender" whose every utterance respecting the judicial system and its personnel would be scrutinized by the bar disciplinary authorities. He should not, at the very least, be subjected

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<sup>9</sup> It is of interest that the admonition in this case was not designed to be strictly private, as is ordinarily the case, but was conditioned on Judge Karohl's being advised about it.

<sup>10</sup> *In Re Kopf*, 767 S.W.2d 20, 22 (Mo. banc 1989).

to additional sanctions for refusing it. The most that he should risk is a formalization of the charges, with no sanction in excess of a public reprimand. An admonition is not an invitation to plea bargain, designed in part to cut down on the burdens of the prosecutor. Its sole purpose is advisory and remedial, in a case in which the respondent's fitness to practice is not questioned.

After the admonition was refused the Committee filed an information praying that the respondent "be disbarred, that his right and license to practice law be canceled and terminated, and that his name be stricken from the roll of attorneys in this state." The message was loud and clear. If a lawyer doesn't say "uncle" when the Advisory Committee offers an admonition, then they'll throw the book. Many accused lawyers would accept admonitions they consider unwarranted rather than subjecting themselves to public prayers for disbarment.

Next, at the hearing before the master, the informants made a highly publicized recommendation for a suspension of three years. This recommendation was confirmed in their brief, and, in oral argument, they asked for a "substantial" suspension. The Committee's recommendation can only be regarded as further attempt at punishment for rejecting the admonition.<sup>11</sup>

But this is not all. The informants argued in their brief, and also before us, that the Court could consider additional charges of rule violation, of which the respondent had no notice, in support of the enhanced sanction they sought. It was then asserted that the respondent's criticism of the original Bullock

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<sup>11</sup> Based on our cases, a recommendation either of disbarment or substantial suspension for this single offense is patently ridiculous, whether or not a reprimand was previously tendered.



jury after the verdict violated Rules 3.6(a) and 3.8(e).<sup>12</sup> Neither of these rules was mentioned in the information. This approach is not only in conflict with our rules; it violates the elementary principles of due process of law. The principal opinion properly states that these additional charges are not being considered, but we should go further. We should tell the Advisory Committee in no uncertain terms that an information in a disciplinary action must set out all of the rule violations the Committee relies on in support of the discipline it seeks. If additional charges are sought an amended information should be tendered. This attempt to proffer additional charges is a further example of chilling tactics.

The tactics of the Committee are appropriate for comment in this case, in which the respondent is being charged for what he said. The principal opinion suggests that the relationship between the First Amendment and lawyer disciplinary proceedings has not been well defined in the case law. If this is so, we should respect those who invoke the First Amendment when they are drawn into court because of what they say. We should not forget the blood that has been shed in defense of free speech. Some defenders may turn out to be wrong and may ultimately suffer sanctions, but they should not be placed in additional jeopardy for seeking judicial determination of their rights as they view them. The Advisory Committee's conduct has a strong potential for chilling freedom of expression. The Court should abate the proceedings, drawing an analogy from findings of prosecutorial misconduct in criminal cases.

There is a further chilling in the intimation in the master's report and in the principal opinion that the respondent should have made some sort of apology on the record, after the filing of

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<sup>12</sup> I am rather shocked by the intimation that a prosecutor might be disciplined because he criticized a jury which returned a full or partial acquittal.



the information. The opinion refers to his "private" statement of confidence in the judge's integrity and his apology at the formal hearing, but then asserts that he has "continually and steadfastly refused to deviate from his original position." I do not understand this at all. After the formal hearing his license was in jeopardy. He should be entitled to make his defense, and public statements outside of the proceedings should surely be discouraged. He explained that he meant no criticism of the judge's integrity. Is the Court suggesting that he should have announced a change in his view of the court of appeals opinion? We have no right to browbeat him in this manner.

The opinion presents a further problem by its repeated suggestions that the respondent has not laid an adequate research foundation for his criticisms of the Karohl opinion.<sup>13</sup> It faults him for pointing only to "the long and tortuous history of armed criminal action in Missouri," and for his not "suggesting precedent or logic that he believes would constitute an 'honest' opinion . . . ." It says that he "failed to investigate to determine whether Judge Karohl has participated in any cases involving the armed criminal action rule," overlooking his participation in the issuance of the preliminary rule. These comments belie the finding of false statement of fact.

### *Conclusion*

Make no mistake about it. The principal opinion chills lawyers' speech about judicial decisions. It invites the speaker to weigh every word. It invites political opponents to scan statements for the least suspicion of a false statement of fact and to publicize the filing of charges for any criticism of a court or a

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<sup>13</sup> See, e.g., *St. Amant v. Thompson*, 390 U.S. at 733 (negligent failure to investigate does not constitute recklessness).

judge, or, for that matter, of any of the other persons protected by Rule 8.2(a), which applies to statements about adjudicatory officers, public legal officers and candidates for election or appointment to judicial or legal office, as well as to judges. The disadvantages of allowing these kinds of complaints far outweigh the advantages. *See NAACP v. Button*, 371 U.S. at 433, warning of the danger inherent in censoring criticism of public issues, as follows:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions leads to . . . 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

The respondent adduced quite a few statements of other lawyers and judges containing comments about judicial decisions similar to the statements challenged here. The principal opinion testily replies that "It is not respondent's function, but the appropriate disciplinary committees', to initiate enforcement of the Professional Rules." This language portends further disciplinary proceedings against lawyers and judges who express themselves too freely. Many will conclude that it is wise to keep quiet. Lawyers, who have contributed so much to public discussion in the past, should not be severely disadvantaged as compared to other members of the public.

On the whole record, Westfall should be fully discharged of the information.

/s/ Charles B. Blackmar, Chief Justice

**APPENDIX B**  
**IN THE SUPREME COURT OF MISSOURI**  
**EN BANC**

No. 72022

In the Matter of:

**GEORGE R. ("BUZZ") WESTFALL**

**REPORT OF SPECIAL MASTER**

Comes now the Special Master in this case and reports to the Court as follows:

The Advisory Committee of the Missouri Bar Administration has filed its information seeking disciplinary action against Respondent, George R. Westfall. Respondent is a licensed Missouri attorney and is currently the Prosecuting Attorney of St. Louis County, Missouri. The information charges that Respondent made a television press conference attack upon the integrity of the Honorable Kent E. Karohl, a Judge of the Missouri Court of Appeals. The Advisory Committee asserts that Respondent's statement was false or known to be false by the Respondent, and that it constituted professional misconduct.

**I.**

**MATTERS NOT IN ISSUE.**

It may be immediately asserted that there are no issues presented in this case concerning certain matters.

A. Both parties agree that there is no issue in this case concerning either the integrity or the competency of Judge Karohl. Respondent has testified that he does not question, and did not intend to impugn in any way, the personal integrity of Judge Karohl by the statements which he made. During these proceedings, Respondent's attorney has characterized Judge Karohl as "a fine lawyer, and a fine judge".

B. Both parties also agree on the following:

A citizen may criticize the government, its actions and policies. Likewise a lawyer is free to criticize the state of the law. *In Re Sawyer*, 360 U.S. 622 (1959). It imputes no disgrace to say a judge is wrong on the law since appellate courts say so regularly. "The public attribution of honest error to the judiciary is no cause for professional discipline" *Id.* at p. 635. The attorney for the Advisory Committee concedes that anyone has the right to disagree with and criticize a court opinion.

A lawyer may even accurately and truthfully attack the integrity or competence of a court or judge if done in a proper tone and through appropriate channels. 7 C.J.S. Attorney and Client, Sec. 23, p. 752.

C. There is no issue presented here concerning "freedom of the press" or the right of the television station to broadcast Respondent's statements. Under the "fair comment" doctrine, the media "has the right fairly and honestly to comment upon a matter of public interest." *Henry v. Halliburton*, 690 S.W.2d 775, 780 (MO Banc 1985). A fair and accurate report by the media of the statement of an officer of the government is privileged. Restatement Second Torts, Sec. 611, Comment d; *Lami v. Pulitzer Pub. Co.*, 723 S.W.2d 458, 459-460 (1986); *Time, Inc. v. Pape*, 401 U.S. 279; *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir, 1977).

Since this was a videotaped television interview, there is no question but that the media report was "a fair and accurate account."

## II.

### THE UNDERLYING CASE

This case arises out of the much publicized prosecution of Dennis Bulloch for crimes committed in connection with the death of his wife, Julia. Respondent has referred to the Bulloch case as "a sensational murder case, perhaps one of the four or five most publicized cases in my twenty years of prosecuting in the St. Louis area." (MBA Ex. 1, p. 68)

In May 1986 Julia Bulloch's bound and gagged body was found in the burning garage of her home in Ballwin, Missouri. An investigation revealed that Julia died not from the fire, but of suffocation caused by two pieces of cloth which were jammed into her mouth and held in place by tape wrapped around her face and over her mouth.

In August 1986, Dennis Bulloch was indicted for first degree murder. A month later, he also was indicted for arson. Bulloch's trial on the murder charge commenced in May 1987. At trial Bulloch testified that his wife died during a drunken night of consensual sexual bondage after he had passed out in the bathroom. The jury evidently believed Mr. Bulloch, acquitted him of murder in the first degree, and found him guilty of involuntary manslaughter. The jury assessed a punishment of imprisonment for a term of seven years.

On June 18, 1986, Bulloch was indicted on charges of armed criminal action and destroying physical evidence. Thereafter Defendant Bulloch, through his attorney, filed Motions to Dismiss, based first on prosecutorial vindictiveness, and second, with respect to armed criminal action on the basis of Double Jeopardy. These motions were denied by the trial court; and Bulloch sought a writ of prohibition in the Court of Appeals seeking to bar the further prosecution of these charges.

On August 9th, 1988, the Court of Appeals issued a Opinion prohibiting the trial court from proceeding with the armed criminal action charge. (Mo. App. E.D. #54859, Aug. 9, 1988) The opinion was written by Judge Kent E. Karohl, and joined by Judges Kelly and Smith. The opinion held first that the question of prosecutorial vindictiveness involved disputed facts and was a matter for the trial courts discretion to be considered, if necessary, on direct appeal; and second, that a subsequent trial of Bulloch for armed criminal action would constitute Double Jeopardy under the Fifth Amendment of the United States Constitution.

On the day the opinion was issued, Respondent was interviewed by the press and made remarks critical of Judge Karohl, which are the basis of the information filed in this case. The interview was videotaped, and portions of it were shown on the six p.m. news and ten p.m. news by KSDK-TV Channel 5, an NBC affiliate television station in St. Louis.

The proceeding in prohibition was subsequently transferred to the Missouri Supreme Court which arrived at the same result as the Court of Appeals and prohibited the further prosecution of the armed criminal action upon the basis of Double Jeopardy. *State ex rel Bulloch v. Seier*, 771 S.W.2d 71 (MO Banc 1989).

In the opinion in *Bulloch v. Seier*, supra, the Missouri Supreme Court held first, that the murder and armed criminal action counts could have been joined and tried together where "the charges arose from the same transaction and relate to acts committed against the same victim". Section 565.004.2 RSMo. 1986. It held secondly, that since "[a]n armed criminal action by definition, incorporates all the elements of the underlying felony", "[t]he two offenses are therefore the same for purposes of relators claim of successive prosecution." Thus where the armed criminal action was exactly the same crime as the underlying felony of murder or involuntary manslaughter, and allowed only



to enhance punishment, a second trial on the same charge would constitute Double Jeopardy under the Constitution. *Illinois v. Vitale*, 447 U.S. 410 (1980), *Brown v. Ohio*, 432 U.S. 161 (1977). Thus the two charges had to be tried in a "single trial". *Missouri v. Hunter*, 459 U.S. 359 (1983).

Respondent did seek review of the Missouri Supreme Court opinion by the Supreme Court of the United States, but review was denied. *Missouri v. Bulloch*, 493 U.S. \_\_\_, 110 S.Ct. 718, 107 L.Ed.2d 738 (1990).

Subsequently, Bulloch was convicted on the arson and tampering charges. However, that conviction was reversed upon appeal upon a finding of prosecutorial misconduct by way of argument to the jury improperly referring to Bulloch's failure to testify in violation of his constitutional rights. *State v. Bulloch* (Mo. App. E.D. #55705, Feb. 13, 1990).

### III

#### A. THE CHARGES OF PROFESSIONAL MISCONDUCT IN THIS CASE

On January 31st, 1989, as a result of Respondent's remarks, the Advisory Committee of the Missouri Bar Association charged Respondent with professional misconduct. A hearing was held before the Eastern Division of the Advisory Committee on June 1st, 1989, and the committee found probable cause to believe that Respondent was guilty of misconduct.

Upon Respondent's rejection of a "written admonition" on August 31st, 1989, the general chairman filed an information in the Supreme Court on behalf of the Advisory Committee of the Missouri Bar, consisting of nine attorneys and two lay members. (Only one attorney member and one lay member are from the St. Louis area.)



The information filed by the Advisory Committee charges Respondent with violating Disciplinary Rules 8.2(a) and 8.4(a)(d) of Supreme Court Rule 4, Rules of Professional Conduct.

Disciplinary Rule 8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Rule 8.4 (a) and (d) provides:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of Professional Conduct . . . .
- (d) engage in conduct that is prejudicial to the administration of justice;

Respondent's videotaped statement was broadcast on the St. Louis NBC affiliate television station on August 9, 1988, the day Judge Karohl's opinion was handed down. Respondent's statement was as follows:

. . . The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.

. . . .

. . . but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.

. . . .

The decision today will have a negative impact on all murder one cases pending in Missouri, in the future, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.

. . . .

but if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

The Bar states that the Respondent's statement made the specific charges, first, that the judge made up his mind before he wrote the decision; second, that the judge "just reached the conclusion that he wanted to reach"; and third, that the reasons for the opinion were "somewhat illogical"; that the reasons for the opinion were ". . . a little bit less than honest"; that Judge Karohl "has really distorted the statute", and that Judge Karohl "convoluted logic to arrive at a decision that he personally likes".

The Bar submits that Respondent reacted to Judge Karohl's opinion in utter disregard of the truth, the integrity of the judicial process, and of his obligations with respect thereto. And that he did so without any investigation of the facts and without any factual basis for his statements.

#### B. RESPONDENT'S DEFENSES.

Respondent admits making the statements in issue, but denies that they violated Disciplinary Rules or that they were known to be false or made with reckless disregard of their truth or falsity.

Respondent also raises three affirmative defenses.

1) The first affirmative defense properly points out that the discipline in this case, if any, is within the discretion and authority of the Supreme Court. That is correct and no further discussion is required of this defense.

2) Respondent's second affirmative defense asserts his rights under the free speech clause of the First Amendment to the Constitution of the United States, and under the Constitution of Missouri, Art. I, Sec. 8, "to criticize an opinion of a judge if the remarks are not knowingly false or untrue or otherwise contrary to Rules 8.2 (a) and 8.4 (a)(e) of Rule 4 of the Missouri Rules of Court of the Supreme Court of Missouri."

Respondent also asserts under the free speech defense that his statements were only the expression of opinion which cannot be false or give rise to any issue of truth or falsity. He lastly asserts that his expressed opinions were directed to the Court of Appeals opinion and not to the qualifications or integrity of Judge Karohl; and thus did not violate the Disciplinary Rules.

Your Master considers the "free speech" issues to be central to the determination of this case. They will be considered hereafter in a general discussion and in the analysis made of the specific disciplinary rules involved.

3) Respondent's third affirmative defense asserts that: Respondent represents St. Louis County, Missouri, and has the right to publicly criticize a judge he believes is wrong, just as a private practicing lawyer in the confines of his office has the right to criticize a trial judge's opinion and tell his client that the opinion should be appealed.

In fact a Prosecutor does not represent a "county" or "all of the people" of a county, but rather "... he represents the sovereign power of the people of the state". 27 C.J.S. District and Prosecuting Attorneys, Sec. 1, p. 622-23; and he acts in the name of the "State of Missouri". A prosecutors professional decisions

must be based upon the facts of the case as he understands them and upon the law which applies. Those decisions cannot be made upon the basis of discussions with “all of the people”.

A prosecutor has “the ability to influence and ensure proper governmental procedure without resort to public opinion”. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253 (7th Cir. 1975). “The judicial system has the right to expect that its own officers will not make public that which should not reach a juror”. *Id.* at page 254.

A lawyer or a prosecutor must obey the law as provided in the Disciplinary Rules or be subject to discipline for professional misconduct. The third affirmative defense should be denied.

### III

#### ANALYSIS OF FREE SPEECH

##### A. THE NATURE OF FREE SPEECH

The First Amendment to the Constitution of the United States provides that: “Congress shall make no law . . . abridging the Freedom of Speech.” Freedom of Speech is among the fundamental personal rights and liberties protected from impairment by the states by the Due Process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). *Stromberg v. California*, 283 U.S. 359. The Missouri Constitution also protects “Freedom of Speech, no matter by what means communicated”. MO Const. Art. I, Sec. 8.

Justice Cardozo said that “Freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319 (1937). Free speech is given a “preferred place” as one of the “great, the indispensable democratic freedom secured by the First Amendment.” *Thomas v. Collins*, 323 U.S. 516 (1945).

In *Whitney v. California*, 274 U.S. 357 (1927) Justice Brandeis described “freedom to think as you will, and to speak as you think” as a “means indispensable [sic] to the discovery and spread of political truth”, and as essential both to “stable government” and to “political change”. *Id.*, 375-377.

“At the heart of the First Amendment is the recognition of the phenomenal importance of the free flow of ideas and opinions on matters of public interest and concern.” *Hustler Magazine v. Falwell*, 458 U.S. 46, 50 (1988). “[T]he freedom to speak one’s mind is not only an aspect of individual liberty - and thus a good unto itself - but also is essential to the common quest for truth and the vitality of society as a whole.” *Bose Corp. v. Consumer’s Union of the United States, Inc.*, 466 U.S. 485, 503-504 (1984).

#### B. FREE SPEECH AND PUBLIC DEBATE.

The Supreme Court has recognized a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometime unpleasantly sharp attacks on government and public officials. *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964). “One of the prerogatives of American citizenship is the right to criticize public men and measures.” *Baumgartner v. United States*, 322 U.S. 665, 673 (1944). “The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical to those who hold public office.” *Associated Press v. Walker*, 388 U.S. 130, 164.

In *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-746, it was stated:

“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed if it is the speaker’s opinion that gives offense, that consequence is a reason for according a constitutional protection for it is a

central tenant of the First Amendment that the government must remain neutral in the marketplace of ideas.”

“The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste on all public institutions.” *Bridges v. California*, 314 U.S. 252, 270 (1941).

Thus persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not. *State Bar v. Semaan*, 508 S.W.2d 429, 432 (TX 1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

### C. GENERAL EXCEPTIONS TO FREE SPEECH RULES.

The Supreme Court recognizes however that “not all speech is of equal First Amendment importance”, and that “[i]t is ‘matters of public concern’ that is at the heart of the First Amendment’s protection.” *Dunn and Bradstreet v. Green Moss Builders*, 472 U.S. 749, 759 (1984). The “majestic protection of the First Amendment” does not extend to certain utterances because they “are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Generally restrictions on free speech can survive judicial scrutiny under the First Amendment only if certain fundamental and stringent conditions are satisfied. First, the limitation must “further an important or substantial governmental interest unre-



lated to the suppression of expression.” *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). Second, the restriction must be “no greater than is necessary or essential to the protection of the particular governmental interest involved.” *Id.*

Regulation of speech is generally unconstitutional unless it is shown that the message constitutes a defamatory falsehood, or poses a “clear and present danger” to important governmental interest. Tribe, *American Constitutional Law*, Second Edition, Sec. 12-2, p. 791-792 (1988). The Court applies the “most exacting scrutiny” to regulations of speech based on its content, and such restrictions are only valid if “necessary to serve a compelling state interest and . . . narrowly drawn to that end.” *Id.* 798-799.

Thus many exceptions have arisen to the blanket protection of the First Amendment. For example, most Americans are familiar with Justice Holmes statement that: “The most stringent protection of free speech would not protect a man in falsely shouting “fire” in a theater and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

There are many other recognized limitations as well. Speech that is “vulgar”, “offensive”, and “shocking” is not entitled to absolute constitutional protection under all circumstances.” *FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978). The state can lawfully punish individuals for the use of insulting “fighting words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, *supra* at page 572. Obscene materials offensive to contemporary moral standards may be controlled. *Roth v. United States*, 354 U.S. 476. Society can protect children from materials available to adults. *Ernoznik v. Jacksonville*, 422 U.S. 205, 212 (1975). Prisoner mail may be censored for limited purposes. *Procunier v. Martinez*, 416 U.S. 396. Publication of troop ship sailings during wartime may be enjoined *Near v.*



*Minnesota Ex Rel Olson*, 283 U.S. 697, 716 (1931). Child pornography is not protected. *New York v. Ferber*, 458 U.S. 747 (1982).

Although students in public schools do not “shed their constitutional rights to freedom of speech or expression at the school-house gate”, *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969), “[a] school need not tolerate student speech that is inconsistent with its basic educational mission.” *Bethel School Dist. #403 v. Fraser*, 478 U.S. 675, 685 (1986); or that would “substantially interfere with the work of the school or impinge upon the rights of other students.” *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

#### D. DISCUSSION OF OTHER “FREE SPEECH” ISSUES.

1) An important general exception for the purposes of this case is that *defamatory statements* are outside the circle of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). This exception is critical to the alleged violation of Disciplinary Rule 8.2 and will be discussed in Section IV, Analysis of Disciplinary Rule 8.2

2. There are also general and specific limitations on a lawyer’s “free speech”. These are related to the alleged violation of Disciplinary Rule 8.4.

### IV. ANALYSIS OF DISCIPLINARY RULE 8.2

#### A. NATURE OF RULE 8.2

As indicated this rule prohibits a lawyer from making a statement, that the lawyer knows to be false or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge. Essentially it forbids professional misconduct by a lawyer by way of defamation of a judge.

However, The Rules of Professional Conduct encompass “a much broader spectrum of protection” than defamation. *Matter of Terry*, 394 N.E.2d 94, 95 (IN 1979). Although a defamatory statement about a judge may directly affect an individual, it “is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.” *Id.* Nonetheless an examination of the law of defamation is necessary here to determine 1) if the statements made were improper under Rule 8.2, and 2) if restrictions upon the statements would violate Respondent’s constitutional rights of free speech.

The law of defamation and the individual’s right to protection of his own good name “reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty . . . the right is entitled to . . . recognition . . . as a basic of our constitutional system.” *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) “Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.” *Gertz v. Welch*, 418 U.S. 323, 344 (1974).

There are also constitutional rights beyond freedom of speech and press at work in this area. Both privacy and reputation involve interests of constitutional dimension. When government limits statements about an individual, it does inhibit speech; “but it also vindicates the individual’s ability to control what others are told about his or her life.” Tribe, *American Constitutional Law*, Sec. 12-12, p. 861. These rights are breached “with unmistakable force, when one’s good name is deliberately and falsely besmirched, doing violence to one’s public identity. Not surprisingly, therefore defamation has long been regarded as a form of ‘psychic mayhem’ not very different in kind, and in some ways more wounding than physical mutilation.” *Id.*

Thus defamation has been classified as wholly outside the scope of First Amendment free speech protection. *Chaplinsky v. New Hampshire*, supra; *Beauharnais*, supra. Chief Justice Rehnquist has observed that “False statements of fact are particularly valueless; they interfere with the truth seeking function of the marketplace of ideas and they cause damage to an individuals reputation that cannot easily be repaired by counter-speech, however persuasive or effective.” *Hustler Magazine v. Falwell*, Supra, p. 49. “There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances societies interest in “uninhibited, robust and wide-open debate in public issues.” *Gertz*, supra, 418 U.S. at 340.

Free speech “values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government.” White, J. concurring, *Dunn & Bradstreet v. Green Moss Builders*, 472 U.S. 749, 767 (1984).

“The lie, knowingly and deliberately published about a public official” is simply beyond the constitutional pale. *Garrison v. Louisiana*, supra, 379 U.S. at 75.

However to encourage the discussion of public issue, including the conduct of public officials, and to remove the inhibitory effect of the defamation law, the Supreme Court has created a constitutional privilege for good faith critics of public officials. This constitutional guarantee requires that government may not restrict even defamatory falsehoods relating to a public official’s conduct unless it is proved “that the statement was made with ‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Disciplin-

ary Rule 8.2 follows these constitutional requirements by requiring that a lawyer's statement about a judge must be known to be false, or be made "with reckless disregard as to its truth or falsity".

One of the reasons for giving public officials less protection than others from critical public comment is that they "... usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Gertz*, *supra*, p. 344.

However, it may be noted that this rationale does not apply to a judge because he is required to "abstain from public comment about a pending or impending proceeding in any court." Supreme Court Rule 2, Code of Judicial Conduct, Canon 3 A (6). Thus Judge Karohl was not ethically allowed to make any response to Respondent Westfall's charges at the time they were made, or to this date (since the second Bulloch case is still pending in the trial court and may face further appellate review). Part of the rationale for Disciplinary Rule 8.2 is that judges, "not being wholly free to defend themselves, are entitled to receive the support of the bar *against unjust criticism*." (emphasis added) Ethical Consideration 8-6 of prior Supreme Court Rule 4, Code of Professional Responsibility (effective Jan. 1, 1971-Jan. 1, 1986).

Thus, in order to violate Disciplinary Rule 8.2, Respondent's statements would have to be 1) defamatory, 2) false, and 3) malicious under the New York Times Rule. Even so, Respondent could not be disciplined if his statements were 4) a privileged opinion under "free speech" rules.

## B. DEFAMATORY NATURE OF THE STATEMENTS.

1. A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community. Restatement of Torts Second, Sec. 559, *Henry v. Halliburton*, 690 S.W.2d 775 (MO Banc 1985). "Communications are often defamatory because they tend to expose another to hatred, ridicule, or contempt . . . [Or] may tend to disparage another by reflecting unfavorably upon his personal morality or integrity." Restatement, *supra*, Sec. 559, Comment b.

It is not required that the communication "tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made . . . in a manner that makes it proper to assume that it will reach them." Restatement, *supra*, Section 559, Comment e. "This would normally be presumed if the communication was made on television. Prosser and Keeton, *The Law of Torts*, Sec. 111, p. 772 (Fifth Edition 1984).

In determining whether a statement is defamatory, it is presumed that the persons who heard it understood the words in their ordinary and natural import. 53 C.J.S., *Libel and Slander*, Sec. 165 a, p. 242. Where a statement is capable of two meanings, one defamatory and one not, it must be determined which of the two meanings would be attributed to it by those to whom it is addressed. *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1918). "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Restatement, *supra*, Sec. 563. Where the alleged defamatory matter is published publicly to a large number of recipients, it can be presumed that if the publication was ambiguous on its face and could be construed with two reasonable meanings, some recipients would give it a

defamatory construction.” Prosser and Keeton, *supra*, Sec. 111, p. 783.

In this case, Respondent’s televised communication stated or implied: 1) That Judge Karohl failed to follow the “Supreme Court of the land” which had held that the armed criminal action statute was constitutional, and that it did not constitute Double Jeopardy.; 2) That Judge Karohl “really distorted the statute . . . to arrive at a decision that he personally likes.; 3) that this was for reasons “a little bit less than honest”; 4) that Judge Karohl “made up his mind before he wrote the decision”; and 5) that Judge Karohl “just reached the conclusion he wanted to reach.”

These statements certainly convey to the average television viewer, and to a lawyer viewer that a judge has done something wrong. It certainly disparages a judge and reflects unfavorably upon his morality and integrity. The average lay or lawyer viewer would certainly think less of such a judge.

Because of the wide dissemination of television broadcasting “together with the prestige and potential effect upon the public mind of a standardized means of publication that many people tend to automatically accept as conveying truth”, publication of defamatory matter by videotape statements broadcast on television are actionable *per se*. Restatement, *supra*, Sec. 568 A, Comment a, Sec. 569. In view of the fact that there are several million people in the St. Louis metropolitan area, it can easily been seen that thousands or hundreds of thousands of viewers may have heard the Respondent’s televised statements on the date in question. With resultant harm to him and to the administration of justice.

2. False words which prejudice the person spoken of in his profession or office are actionable *per se* when they impute fraud, want of integrity, or misconduct in his professional work. *Brown v. Kidderman*, 443 S.W.2d 146, 154 (MO 1969); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 496



(Mo. App. 1980); *Smith v. UAW-CIO Federal Credit Union*, 728 S.W.2d 679, 682 (Mo. App. 1987). *Swafford v. Miller*, 711 S.W.2d 211 (Mo. App. 1986). 50 Am Jur 2d, Libel and Slander, Sec. 122 (1970).

Under the Supremacy Clause the Constitution of the United States is "the supreme law of the land; and the judges in every state shall be bound thereby". U. S. Const., Art. VI (2). It is also required that judges be bound by oath to support the Constitution. Id. (3)

Supreme Court Rule 2, Code of Judicial Conduct, Canon 1 finds that "an independent and honorable judiciary is indispensable to justice in our society" and requires that a judge "observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 2A requires a judge to "respect and comply with the law and . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(1) requires a judge to "be faithful to the law, and . . . be unswayed by partisan interest, public clamor, or fear of criticism."

The statements in issue here certainly imply an intentional violation of the Supremacy Clause and the above canons for "dishonest reasons". They thus imply a lack of integrity and misconduct in Judge Karohl's professional work. There was evidence that this was the inference drawn by many viewers of the television report. Respondent testified that he and his associates were contacted by various lawyers who asserted that Respondent had characterized Judge Karohl as being "dishonest". Judge Karohl testified that he received contacts from twenty-five or so lay people, lawyers, and judges who were upset by Respondent's statements.

3. Another aspect of defamation law is implicated here. A statement which falsely imputes criminal conduct to another person is defamatory. *Smith v. UAW-CIO Federal Credit Union*,



728 S.W.2d 679, 682 (Mo App. 1987); *Brown v. Kidderman*, 443 S.W.2d 146, 153 (MO 1969); *Hunt v. Gerlemann*, 581 S.W.2d 913, 914 (Mo App. 1979); Sableman, *The Courts Role in Interpreting Language in Libel and Slander Cases*, 45 Journal of the Missouri Bar, 399, 400. Restatement, *supra*, Sec. 571. A specific crime need not be charged if the conduct is imputed in general terms. Restatement Torts Second, App., Sec. 571, Comment c, p. 408. (1981).

A defamatory imputation may be made by innuendo, Restatement (1977), *supra*, Comment c, or by inference, implication, or insinuation. 53 C.J.S. Libel and Slander, Sec. 13, p. 48. Even a lay viewer could figure out and infer that it was unethical or improper for a judge to "distort a statute to arrive at a decision he personally liked", or to make up his mind before he got the case. When the lay viewer is further told that the improper action was done "for reasons that were a little less than honest", there is then an implication of even more sinister conduct. Since no facts were given to support this conclusion, the ordinary viewer would be left to infer that the dishonest reasons may have involved bribery, coercion, or intimidation, or some personal connection between the judge and some party in the case which led him to reach an improper result. The suggestion that a judge may have accepted some benefit to influence his official action in a pending judicial proceeding implies the crime of "acceding to corruption" under Sec. 575. 280 1.(1) RSMo. 1969. Also see Sec. 576.020 RSMo. 1969.

Even if this was not the meaning that Respondent intended to convey, as a member of a skilled calling, he is held to the standard of his craft and assumes the risk of being misunderstood by the ordinary hearer of his publications. *Greenbelt Co-Op Pub. Assn. v. Bresler*, 398 U.S. 6, 23 (White J., concurring) (1970). Professionals must "guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the

eyes of the average [viewer].” *Id.* In view of the size of the TV audience here, it is evidence that many would infer criminal misconduct from the statement.

4. It is not the intention of the speaker, but the understanding of the hearer, by which defamation is to be determined. 53 C.J.S. Libel and Slander, Sec. 14, p. 50. However the intention of the speaker may, and in this case does, illuminate the defamatory nature of the statements made. Although Respondent’s attorney has asserted that the statements made were an attack on the “court opinion” rather than on Judge Karohl personally, Respondent’s televised statement and his subsequent testimony are to the contrary.

In this respect it must first be observed that Respondent’s statement was specifically addressed to Judge Karohl and not to his “court opinion”. Respondent specifically stated that “*Judge Karohl . . . has really distorted the statute to arrive at a decision that he personally likes, . . . that “means that he made up his mind before he wrote the decision and just reached the conclusion he wanted to reach.”*

Secondly, Respondent’s subsequent testimony demonstrates that his televised statement was not making reference to Judge Karohl’s “court opinion”, but to Judge Karohl and his motivation.

a. Respondent testified that it was Judge Karohl’s “reasons” rather than his “reasoning” which were less than honest. When asked how the “reasons” were less than honest, Respondent’s reply was that he meant “the attitude of the appellate bench historically toward armed criminal action. In my opinion it was Judge Karohl’s judicial bent to begin with that is far too liberal to suit me, that I wasn’t surprised at all by the result.” (T, p. 46).

b. When asked about the statement that the judge “made up his mind before he wrote the decision”, Respondent stated that he

meant "that he'd made up his mind before he got the case." (T, p. 34); and that his intent was to convey the message that he felt Judge Karohl's opinion was a foregone conclusion. (T, p. 43).

c. In explaining why he stated that Judge Karohl prejudged the case to reach a result that he personally wanted, Respondent stated that: "I was giving my opinion as to the decision of the overall context historically and recently of the armed criminal action statute, that the appellate judges of this state have repeatedly beat down the armed criminal action statute." (T, p. 48).

d. Respondent also asserts that he meant that the "court opinion" was "intellectually dishonest". However, he did not use that term in the televised interview. Nor did the television reporter recall hearing the term used, or have any recollection that the term was discussed. The reporter also testified that the term was not used on the parts of the videotape which were not used on the televised interview. (MBA Ex. 1, p. 47)

However, when asked to explain how the opinion was "intellectually dishonest", Respondent did not address the opinion at all, but again referred to his view that the "Missouri Appellate system has been intellectually dishonest concerning armed criminal action from day one, in that they steadfastly refuse to follow the directives of the highest court in the land . . . and I anticipated the same thing would happen again." (T, p. 51-52).

5. The history of the armed criminal action cases which frustrated Respondent Westfall is set out in the case of *State Ex Rel Bulloch v. Seier*, supra. That opinion demonstrates that the issues which had frustrated Respondent had been finally decided in 1983 by the United States Supreme Court in *Missouri v. Hunter*, 459 U.S. 359 (1983); and that the Missouri courts had thereafter complied with the decisions of the United States Supreme Court on armed criminal action.

The only criticism that Respondent has made during these proceedings attacking the “reasoning” of Judge Karohl’s opinion concerns 1) the result reached, and 2) the dictum that the armed criminal action charge could not have been initially tried with the murder charge.

As to the first criticism: the Fifth Amendment to the U. S. Constitution provides that no one shall be “subject for the same offense to be twice put in jeopardy of life or limb.” It is made applicable to the states by the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 795 (1969). In 1983 the United States Supreme Court determined that an “armed criminal action” was the “same offense as the associated felony and had to be tried with it in a “single trial”. *Missouri v. Hunter*, supra. As noted in *Bulloch v. Seier*, supra, the decisions of the United States Supreme Court in *Illinois v. Vitale*, supra, and *Brown v. Ohio*, supra, had previously determined the issues presented to Judge Karohl.

As to criticism of the dictum, Respondent has since testified that he had the same belief, i.e. that the armed criminal action could not have been initially tried with a murder charge. However, both the dictum and Respondent’s view were corrected by the subsequent opinion of the Missouri Supreme Court which held that the armed criminal action charge could have been tried with the murder charge if originally filed with it.

It must also be observed that the dictum had no effect on the outcome of the case under either Judge Karohl’s opinion or that of the Supreme Court.

Thus, although Respondent could have charged and tried Defendant Bulloch with armed criminal action, he and his office failed to do so due to misadventure [sic] or mistake. Respondent testified that he had failed to initially charge armed criminal action with the murder charge because 1) he “hadn’t thought of it prior to the trial”, (Ex. 6, *State v. Bulloch*, motion hearing, p.

85); 2) he didn't think "armed criminal action" applied to the weapon used (Id. p. 94-95); and 3) he [mistakenly] believed that armed criminal action couldn't be tried with the murder charge. (Id. p. 95).

### C. FALSITY OF THE STATEMENT.

Since the statement is found to be defamatory in the sense in which thousands of people would have been expected to understand it, examination must be made as to the truth or falsity of the statement.

In this respect the testimony of Respondent Westfall establishes the falsity of the statement in the defamatory sense. Respondent testified that he did not question Judge Karohl's personal integrity in the least (MBA Ex. 1, p. 66, 83) and that he did not mean to impugn Judge Karohl's personal integrity by the televised statements that he made. (MBA Ex. 1, p. 76, 78-79). Respondent further testified that he had privately apologized to Judge Karohl on the day of the formal hearing before the committee and had advised him that he did not mean to impugn or to question his personal integrity, but only to criticize the opinion. (MBA Ex. 1, p. 79). Respondent also stated that "given a similar situation I may be a bit more cautious to not reflect upon one's personal integrity." (MBA Ex. 1, p. 78-79) Respondent's attorney reported that Judge Karohl "was a fine lawyer and he's a fine judge". (T., p. 15).

At the hearing before the committee Judge Karohl testified that neither he nor the other judges who decided the case had any personal interest or preference in the outcome, and that there were no acts by any of the judges with regard to the management of the case or the preparation of the opinion that were "less than honest". (MBA EX 1, p. 9-10).

Respondent's statement clearly implies that Judge Karohl failed to follow the "Supreme Court of the land" which had held

that “our armed criminal action statute was constitutional and that it did not constitute Double Jeopardy”; and that this was for “reasons less than honest”. This implication is false as well. Judge Karohl’s opinion did not challenge either of those determinations. The opinion merely held as the “Supreme Court of the land” had held in *Missouri v. Hunter*, supra, that armed criminal action and the associated felony had to be tried in a “single trial”.

#### D. THE REQUIREMENT OF MALICE

The malice required is that the statement be made “that the lawyer knows to be false or with reckless disregard as to its truth or falsity.” Disciplinary Rule 8.2, *New York Times Co.*, supra.

In defamation cases, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” *Time v. Pape*, 401 U.S. 279, 291 (1971). There must be “clear and convincing proof that the defendant has knowledge of, or recklessly disregarded the falsity of the defamatory statement.” Tribe, supra, Sec. 12-12, p. 866, *Rosenbloom v. Metro Media Inc.*, 403 U.S. 29, 30 (1971).

In this case Respondent admits that he believed and knew that Judge Karohl was a man of personal integrity. Nonetheless he made the televised statements with the defamatory sense that the judge was unethical, dishonest, or even criminal. His admissions establish that Respondent knew the defamatory statements to be false. Thus Respondent had more than “a serious doubt” as to the truth of the defamatory statements; but rather knew their falsity. This is sufficient to establish a violation of the rule. See *Worley v. OPS*, 686 P.2d 404, 407 (Or App 1984).

Even assuming the possibility that Respondent might not have comprehended the defamatory nature of the statements which he



made, it remains clear that he acted in reckless disregard of the truth or falsity of those statements. "Reckless disregard" is demonstrated by other factors in the case as well.

It is relevant that Respondent had both time and opportunity to investigate the truth of the statement. Restatement, *supra*, Sec. 580A, Comment d. However, Respondent testified that, before making his critical statement about Judge Karohl, he failed to make any check to see whether Judge Karohl had participated in any cases on armed criminal action, written any opinions on it, or expressed any personal opinions about it. Nor did Respondent check with his staff or any other persons in this respect. (T. p. 43-44). This failure demonstrates Respondent's recklessness since he also testified that he made the critical statements because of previous opinions of other appellate judges.

"Reckless disregard" is also demonstrated by another aspect of the case. As a lawyer Respondent was aware that he should report dishonest behavior of a judge to the Commission on Judicial Discipline and Retirement, which would investigate, and if appropriate, prosecute such misconduct. However without making such a report, without that investigation, and without any investigation of his own, Respondent proceeded to make a publicly televised statement alleging unethical and dishonest conduct.

#### E. WERE THE STATEMENTS PROTECTED OPINION?

1. Generally the free speech clause of the First Amendment protects the expression of "pure opinions". *Henry v. Halliburton*, 690 S.W.2d 775, 782 (Mo Banc 1985), *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 498 (Mo App. 1980). 53 C.J.S., Libel and Slander, Sec. 12, p. 45.

Justice Powell wrote for the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However

pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact.”

In analyzing Justice Powell’s meaning in *Gertz* it cannot be overlooked that in his dissenting opinion in *Letter Carriers v. Austin*, 418 U.S. 264, at 297, which was both argued and decided on the same dates as *Gertz*, he argued that while derogatory opinions about “scabs” in general were protected, the speakers had “specifically impugned” the character of the plaintiff in the case and were therefore subject to suit. Justice Powell stated in *Letter Carriers*: “It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter — indeed, it is libelous per se — to publish that lawyer Jones is a shyster or that Dr. Smith is a quack.” Also see *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 62 (2d Cir 1980).

The logic underlying the privilege is that an opinion can never be objectively proved true or false; and a privilege is given to the opinion provided the facts supporting the opinions are set forth. *Buckley v. Littell*, 539 F.2d 882, 893 (2nd Cir 1976), *Anton*, supra at p. 499. Where the facts underlying the opinion are set forth in the article, the opinion is afforded a privilege because each reader may draw his own conclusion to support or challenge the opinion. *Id.* Also see *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d at 1306 (1976).

There is an extensive discussion considering the fact/opinion distinctions in *Henry v. Halliburton*, supra at page 787-789, where it was held that it was essential to examine the totality of the circumstances to determine whether an ordinary reader would have treated a statement as an opinion. *Id.* p. 788.

2. One of the exceptions to the privilege is where a defamatory statement implies the allegation of undisclosed defamatory facts as the basis for the opinion. Restatement Second Torts, Sec. 566;

*Cuba's United Ready Mix v. Bock Concrete*, 785 S.W.2d 649, 651 (Mo. App. 1990); *Iverson v. Crow*, 639 S.W.2d 118, 119 (Mo. App. 1982); *Henry v. Halliburton*, supra; *Anton*, supra. Where a statement indicates that the speaker knew facts establishing the defamatory statement, it is actionable defamation. *Id.*; *Cianci*, supra, 639 F.2d at 63. Where the statement of opinion implies undisclosed facts on which the opinion is based, then the listener can not evaluate the defamatory language since no basis for the statement has been disclosed. 53 C.J.S. Libel and Slander, Sec. 12, p 46.

The Restatement provides an illustration of a mixed fact/opinion statement as follows:

3. A writes to B about his neighbor C: "I think he must be an alcoholic." A jury might find that this was not just an expression of opinion, but that it implied that A knew undisclosed facts that would justify this opinion. *Id.*, Sec. 556 at 174.

A's opinion above is not privileged because "the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts". *Id.*, 175. "This type opinion, while an opinion in form or context, is apparently based on facts . . . that have not been stated . . . [and] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant." *Id.* at 172. Such an opinion is not privileged. *Falls v. Sporting News Pub. Co.*, 834 F.2d 611, 615-616 (6th Cir. 1987).

Respondent's statements here do not provide the facts from which the television viewers could draw their own conclusions to support or challenge his opinions. The thousands of viewers could not understand from the facts asserted 1) how Judge Karohl failed to follow the "Supreme Court of the land", 2) how there was a distortion of the statute, 3) what purpose the judge had to arrive at a decision that he personally liked, 4) why the

judge made up his mind before he heard the case, and 5) what dishonest reasons the judge had to do such things. Thus no privilege attaches under the authorities discussed.

3. In discussion of the defamatory nature of Respondent's statements, *supra*, it was pointed out that false imputation of criminal conduct is defamatory. However, the Missouri Supreme Court has further held that language which suggests specific criminal conduct would constitute a statement of fact rather than a statement of opinion. *Henry v. Halliburton*, *supra*, 690 S.W.2d at 790. 53 C.J.S. Libel and Slander, Sec. 12, p. 47.

There is a critical distinction between opinions which attribute improper motives to a public officer, and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. *Gregory v. McDonnell Douglas Corp.*, 552 P. 2d 425 (1976). There is no First Amendment protection enfolding false charges of criminal behavior. *Id.*

The Court in *Cianci* also declared that the *Gertz — Letter Carriers* rules protecting "pure opinions" do not cover charges which could reasonably be understood as imputing specific criminal or other wrongful acts." 639 F.2d at 64; and that the clear implication of the United States Supreme Court in *Greenbelt Pub. Co-Op Pub. Assn. v. Bressler*, 398 U.S. 6 (1970) was "that if an accusation of actual criminal wrongdoing had been conveyed . . . it would have been held actionable . . ." *Id.* at 62.

Thus, when a speaker said that he *considered* William F. Buckley to be a libeler like Westbrook Pegler, the court held that the "opinion" was something more than a general derogatory remark, but was laden with factual content, charging the commission of a serious crime; and the First Amendment did not confer a privilege to such an opinion. *Buckley v. Littell*, *supra*. The statement of an opinion charging a judge with corruption was held not constitutionally protected in *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299 (NY 1977).

“To say of a person that he is a thief without explaining why, may depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery.” Restatement, *supra*, Sec. 566, Comment b. Likewise to say of a judge that he has done improper, unethical acts for dishonest reasons without explaining why implies that he has committed criminal misconduct.

In the instant case Respondent’s television interview clearly stated or implied wrongdoing by Judge Karohl. Without disclosure of the underlying facts, the viewers were not able to evaluate the defamatory language. Either lay or lawyer viewers could conclude from the statements that the judge had acted unethically, improperly, or even criminally. The charges were made “of specific defined conduct . . . not couched in terms of opinion based upon described fact premises”, and “far removed from mere expressions of non-actionable opinion.” *Smith v. UAW-CIO Federal Credit Union*, 728 S.W.2d 679, 685 (Mo. App. 1987).

4. It has also been held that opinions “relating to one’s professional integrity that are susceptible of proof” are expressions of fact. *Held v. Pokorny*, 583 F. Supp. 1038, 1049 (S.D.N.Y. 1984), *Edwards v. National Audubon Society, Inc.*, 556 F.2d at 121-22, 53 C.J.S. Libel and Slander, Sec. 12, p. 47. Since the Respondent concedes Judge Karohl’s personal integrity, the defamatory statements referring to Judge Karohl’s professional integrity are susceptible of proof in this case, and also constitute expressions of fact, which are not protected.

5. Professor Prosser states that, “it can be said that the state of a person’s mind is a fact and if a publisher misrepresents his state of mind, he misrepresents a fact even though it is only an opinion.” Prosser and Keeton, *supra*, Sec. 113, p. 814. Thus where Respondent made a statement or expressed opinions which were defamatory, but which he did not believe, he would

have misrepresented the fact relating to what his opinion was. Thus there would be no privilege.

#### E. SUPPLEMENT TO "PROTECTED OPINION"

Since the foregoing Section E was dictated, the United States Supreme Court has decided the case of *Milkovich v. Lorain Journal Co.*, No. 89-645, — U.S. — (June 21, 1990).

*Milkovich* holds that the dictum in the *Gertz* case supra, 418 U.S. 323, 339-340, as to "opinion" was not "... intended to create a wholesale defamation exemption for anything that might be labeled "opinion".

In *Milkovich*, Chief Justice Rehnquist states:

"If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' "

*Milkovich* also addressed the issue of opinions "susceptible to proof", and held that statements which are "sufficiently factual to be susceptible of being proved true or false", may be the basis of defamation.

Thus *Milkovich* confirms the previous analysis made under Section E.



F. FINDINGS OF FACT AS TO DISCIPLINARY RULE  
8.2.

Upon the evidence in this case the Master makes the following findings of fact:

1. That Respondent knew and believed that Judge Kent E. Karohl was a man of personal and professional integrity.

2. That Respondent's statement exposed Judge Karohl to hatred, ridicule, or contempt, and reflected unfavorably upon his personal morality and integrity.

3. That Respondent's statement falsely imputed fraud, want of integrity, and misconduct in Judge Karohl professional work.

4. That Respondent's statement falsely imputed criminal conduct.

5. That Respondent's statement disparaged Judge Karohl.

6. That Respondent's statement disparaged the Court of Appeals in the administration of justice.

7. That Respondent's statement related to Judge Karohl and his motivation, rather than to the reasoning of the opinion or an analysis of the opinion.

8. That Respondent intended to state that Judge Karohl had made up his mind before he got the case.

9. That Respondent made no investigation into Judge Karohl's views or previous opinions concerning "armed criminal action" case prior to making his public statement.

10. That Respondent made the statement with malice, i.e., knowing its falsity or with reckless disregard of its truth or falsity.

11. That Respondent's personal attack on Judge Karohl was based primarily upon his disagreement with and frustration from opinions of other Missouri Appellate Judges prior to 1983.

12. That Respondent could have charged and tried Defendant Bulloch with armed criminal action along with the murder charge in the underlying case.

13. That Respondent's failure to initially charge Defendant Bulloch with armed criminal action resulted from Respondent's own mistake or inadvertence.

#### G. CONCLUSIONS OF LAW AS TO DISCIPLINARY RULE 8.2

Upon the evidence in this case and the foregoing discussion, the Master makes the following conclusions of law:

1. That Respondent's televised statement was defamatory as to the Court of Appeals and Judge Karohl.

2. That Respondent's statement violated Disciplinary Rule 8.2.

3. That Respondent's statement did not constitute a "privileged opinion".

4. That Disciplinary Rule 8.2, as applied to Respondent's known false charges about Judge Karohl, is not unconstitutional as a violation of the "free speech clause" of the First Amendment.

5. That the Advisory Committee has sustained its burden of proof by clear and convincing evidence.

#### V ANALYSIS OF DISCIPLINARY RULE 8.4

This rule provides that it is "professional misconduct" for a lawyer to (a) violate the rules of professional misconduct and (d) "engage in conduct that is prejudicial to the administration of justice". The specific misconduct charged is the making of a false statement about Judge Karohl as previously described.

Rule 8.4(a) refers to all violations of the Disciplinary Rules, including 8.2, 8.4(d) and 3.6 relating to a lawyer's extra-judicial statements about pending cases.

A violation of Rule 8.2, by false criticism of a judge, may also violate Rule 8.4(d) insofar as a defamatory statement would prejudice the fairness and procedural safeguards of the judicial process by an attempt to influence, intimidate or coerce the actions of jurors or judges, or affect the public confidence in the courts. Thus Section 8.4(d) relates to "conduct" even by way of speech.

The development of the law in this area has not been under the law of "defamation", but rather under the law relating to Contempt of Court and Lawyer Disciplinary Proceedings.

Professor Tribe has pointed out two distinctive approaches by the United States Supreme Court to "free speech" claims. When a government regulation is aimed at the communicative impact of an act, a regulation is unconstitutional unless it is shown that the message poses a "clear and present danger" or is a defamation. However when the government regulation is aimed at the non-communicative impact of an act, the "regulation is constitutional, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas." Tribe, *supra*, Sec. 12-2, p. 791-792.

In simple terms, shouting "fire" in the crowded theater is conduct rather than speech. There is no "communication" and no "content" in such a false expression. Rather, the shout is conduct meant to cause panic or alarm. Similarly making a known false accusation against a judge in a pending proceeding is not "speech" discussing a public issue, but rather it is "conduct" in the nature of an attack or assault. There is no "communication" and no "content" in such a false expression. The regulation of false statements is thus content neutral. *Chaplinsky, supra*. Such conduct might be for the purpose of coercing, influencing, or

intimidating a judge so as to affect the result in a pending case. Such conduct may constitute "contemptuous conduct" punishable as contempt of court, or "unethical conduct" punishable as professional misconduct.

The Supreme Court has held "that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968). Ggovernment [sic] regulation of such speech/conduct is sufficiently justified if it furthers an important governmental interest, unrelated to the suppression of free expression, and if the incidental restriction on speech is no greater than essential to the furtherance of that interest. *Id.*

Speech, whether oral or symbolized by conduct, is also subject to reasonable time, place, and manner restrictions. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Such restrictions are valid provided they are justified without reference to the content of the regulated speech, ordinarily tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Id.*

Examination of these issues of "conduct" may be made by reviewing 1.) responsibilities of lawyers and prosecuting attorneys, 2.) restrictions on lawyer speech, and 3.) analysis of the conduct in this case.

#### B. RESPONSIBILITIES OF A LAWYER AND PROSECUTING ATTORNEY

1. Courts cannot function without lawyers. "The office of attorney is indispensable to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court." 7 C.J.S. Attorney and Client, Sec. 4, p. 802. Lawyers act "as assistants to the court in search of a just solution to disputes." *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

Upon being admitted to the Missouri Bar every lawyer must take an oath as required by Supreme Court Rule Rule 8.11. The oath taken by Respondent Westfall was in part that he would support the Constitution, faithfully demean himself in his practice, maintain [sic] the respect due to courts of justice [sic] and judicial officers, abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged.

2. The legal profession is largely self-governing; and "this relative autonomy carries with it special responsibilities of self-government." Preamble, Rules of Professional Conduct. Thus, "every lawyer is responsible for observance of the Rules of Professional Conduct" *Id.* Lawyers are required to know and comply with the law and court rules designed for the protection of the public by aiding in the administration of justice and upholding the authority and dignity of the courts. 7 C.J.S. Attorney and Client, Sec. 46, p. 904.

Thus a lawyer has a duty to see that actions and proceedings in which he is engaged "are conducted in a dignified and orderly manner, free from passion and personal animosities, and that all causes brought to an issue are tried and decided on their merits only" 7 C.J.S. Attorney and Client, Sec. 4, p. 802. An attorney is required to conduct himself "with integrity, honesty and fairness, and to preserve the respect and confidence of the public, the courts and the legal profession." *Id.*, Sec. 45, p. 901.

The Supreme Court has explained this requirement in the case of *In Re Snyder*, 472 U.S. 634, 647 (1985) as follows:

"All persons involved in the judicial process — judges, litigants, witnesses, and court officers — owe a duty of courtesy to all other participants. The necessity for civility in the inherent contentious setting of the adversary process suggests that member of the bar cast criticisms of the system in a professional and civil tone."

If a lawyer fails to conform to a high standard of ethics, he may “bring disrepute upon the legal profession, impair the standard of the courts, and impede the administration of justice.” *Leimer v. Hulse*, 178 S.W.2d 335, 339 (Mo 1982).

The legal profession has developed its own rules of ethics, and it is a function of the Bar Association to maintain high standards of professional conduct by its members. Lawyers from across the state have served on various committees of the Missouri Bar Association to review the Rules of Ethics and make recommendations to the Missouri Supreme Court in that respect. Respondent Westfall was in fact a member of the committee which recommended the adoption of Disciplinary Rule 8.2, which was adopted in 1985.

Since 1804 the Supreme Court, in the territory and State of Missouri has had the power and authority to discipline Missouri lawyers for their misconduct. Divine, *Lawyer Discipline in Missouri*, 46 Missouri Law Review, 709, 712. The United States Supreme Court has noted that: “Courts have long recognized an inherent authority to suspend or disbar lawyers . . . this inherent power derives from the lawyer’s role as an officer of the court which granted admission.” *In Re Snyder*, supra, 472 U.S. at 643; C.J.S. Attorney and Client, Sec. 43, p 895; *In Re Thompson*, 574 S.W.2d 365 (MO 1978). Under Supreme Court Rule 5.18, the Supreme Court is charged with the duty of reprimanding, suspending, or disbaring lawyers who are found guilty of professional misconduct.

The purpose of supervision of the bar by the judicial system “is to qualify the bar to perform its function for the public benefit, and to maintain publicly beneficial professional standards and conduct . . .” 7 C.J.S. Attorney and Client, Sec. 43, p. 894. Thus lawyer disciplinary proceedings are not designed with a primary purpose of punishment, but as an inquiry into a lawyer’s fitness to continue as a lawyer, and any discipline imposed has as its



objective the protection of the courts and the public, and the maintenance of the integrity of the profession and the court." *In Re Haggerty*, 661 S.W.2d 8 (MO 1987). *In re Staab*, 785 S.W.2d 551, 554 (1990). The paramount objective in disciplinary proceedings is to protect society and maintain the integrity of the legal profession. *In Re Lang*, 641 S.W.2d 77 (MO 1982); *Leimer v. Hulse*, supra; *Middlesex Ethics Com. v. Garden State Bar Assn.*, 457 U.S. 423, 434 (1982).

3. As lawyers, Prosecuting Attorneys must meet all of the requirements of the Rules of Professional Conduct. However, they, and all "lawyers holding public office assume legal responsibilities going beyond those of other citizens." Comment, Disciplinary Rule 8.4. The "Special Responsibilities of a Prosecutor" are described in Disciplinary Rule 3.8. The Comment to that rule states that "a Prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Prosecutors have been described as "judicial or quasi-judicial officers". 27 C.J.S., District and Prosecuting Attorneys, Sec. 1, p. 622.

A prosecutor's obligation is not simply to obtain a conviction, but to see that justice is done and that the accused gets a fair trial. *State v. Hicks*, 535 S.W.2d 308, 311 (Mo App 1976); *State v. Jackson*, 664 S.W.2d 583, 584 (Mo App. 1984); Volume 1, ABA Standards for Criminal Justice, 2nd Ed, *The Prosecution Function*, Sec. 3-1.1.(c), 1978). It is the duty of the Prosecutor to be impartial and to refrain from conduct that causes him to be a heated partisan who appeals to prejudice and seeks conviction at all costs. *State v. Wintjen*, 500 S.W.2d 39, 43-44 (Mo App 1973).

### C. LIMITATIONS ON LAWYER "FREE SPEECH"

1.) The Supreme Court has consistently used the "clear and present danger" standard in reviewing out-of-court statements critical of the administration of justice in ongoing judicial proceedings; and has assumed that all behavior and speech that prevents the fair adjudication of a case presents a "clear and

present danger”, and is punishable as contempt. *Tribe*, supra, Sec. 12-11, p. 856-857. The state’s interest advanced to justify this limitation is the interest in fair trials, in putting guilty criminals in jail, and in maintaining confidence in the fairness of the judicial system. *Id.*, n. 3, p. 857. However, such statements must pose a “serious and imminent threat” of interference with the fair administration of justice. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1974), *In Re Oliver*, 452 F.2d 111 (7th Cir 1971).

The United States Supreme Court has recognized “ that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interest they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the court”. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). *In Re Primus*, 436 U.S. 412, *Ohrlick v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978).

“The most fundamental of all freedoms” is the right to a fair trial. *Estes v. Texas*, 381 U.S. 532, 540 (1965) and courts have the duty to ensure fair trials to all citizens. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); and to control prosecutors and defense lawyers from the divulgence of inflammatory publicity. *Id.*, p. 361; but also see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), *Chicago Counsel of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir., 1975). It is recognized that “[e]xtra-judicial statements to the media provide a powerful prosecutorial weapon to prejudice a defendant’s right to a fair trial.” Gershman, *Prosecutorial Misconduct*, Sec. 6.2 (Clark Boardman Co. 1989).

As expressed by Justice Holmes, "[t]he theory of our system is that the conclusions to be reached in the case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). "Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252 (1941). The Supreme Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chamber v. Florida*, 309 U.S. 227, 236-237 (1940).

When there is an irreconcilable conflict, the right of free speech must give way to the right of a fair trial. *Chicago Council of Lawyers v. Bauer*, supra at p. 248. When the judicial function is integrally threatened by contemptuous expressions, the "administration of the judicial enterprise necessitates subjugation of other rights, including the rights of persons to freely and even intemperately express their minds." *McMilian v. Rennau*, 619 S.W.2d 848, 852 (Mo. App. 1981).

Thus public comment of every character upon pending trials or legal proceedings may not be as free as similar comments after a complete disposal of the litigation. *Pennekamp v. Florida*, 328 U.S. 331, 346 (1946). As Justice Holmes has stated: "When a case is finished, courts are subject to the same criticism as other people. The propriety and necessity of preventing interference with the course of justice by premature statements, argument, or intimidation hardly can be denied." *Patterson v. Colorado*, supra.

Thus there is a "delicate balance between a lawyer's right to speak, the right of the public and the press to access to information, and the need of the bench and bar to ensure that the administration of justice is not prejudiced by a lawyer's remark."

*Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 121-22 (TN 1989). Courts must ensure that lawyer discipline “does not create a chilling effect on First Amendment rights.”

2.) A lawyer is a person and he too has a constitutional freedom of speech, *In Re Sawyer*, 360 U.S. 666 (1959), even as a participant in the administration of justice. *In Re Hinds*, 449 A.2d 483, 489 (NJ 1982).

However, “where a lawyers unbridled speech amounts to misconduct which threatens a significant state interest, a state may restrict the lawyer’s exercise of personal rights guaranteed by the Constitution.” *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Matter of Johnson*, 729 P.2d 1175, 1178 (KN 1986).

“Generally, courts are in agreement that while a lawyer may, in a proper tone and through appropriate channels, attack the integrity or competence of a court or judge, or the propriety of any particular judicial act, he may not, by *unfounded charges* create disrespect for courts or their decisions, and if he does so, he maybe properly disciplined. Attorneys have wide latitude in differing with, and criticizing the opinions of the court, yet when they resort to *misrepresentation and unwarranted assaults on the courts* whose officers they are, they violate their duty and obligation and are subject to discipline. 7 C.J.S. Attorney and Client, Sec. 23, p. 752 (Emphasis added).

“[A] lawyer’s right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct.” *Committee on Prof. Ethics and Conduct v. Hurd*, 360 N.W.2d 96, 105 (IA 1984). Generally, a layman may pursue his free speech until he runs afoul of the defamation laws, but a lawyer will be stopped when he infringes the Canons of Ethics. *In Re Woodward*, 300 S.W.2d 385 (Mo 1957).

A lawyer cannot “invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct”, and he must conform to professional “standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice.” *In Re Sawyer*, supra at page 646-47, Steward J. concurring, and speaking for five members of the court) “Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech”. *Id.*

Thus “attorneys who go beyond the latitude afforded them in differing with, and criticizing the opinions of, the courts and resort to *misrepresentation and unwarranted assaults on the courts*, are subject to suspension or disbarment.” 7 C.J.S. Attorney and Client, Sec. 82 b, p. 995 (emphasis added). A lawyer “has no right . . . to asperse and defame, without justification, the character and motives of the judge upon the bench.” *Leimer v. Hulse*, 178 S.W.2d at 340. There are some special limitations on a lawyer’s speech since his membership in the bar is a privilege burdened with conditions; he is an officer of the court, and “like the court itself an instrument or agency to advance the ends of justice.” *People Ex Rel Karlin v. Culkin*, 162 N.E. 487, 489 (1928).

3. The above principles may be somewhat illustrated by listing specific circumstances where lawyer’s speech is constitutionally restricted.

Many disciplinary rules are well accepted, although they restrict a lawyer’s free speech. For example, free speech does not allow a lawyer to reveal confidential information received from his client. Disciplinary Rule 1.6. Likewise, free speech does not allow a lawyer to represent clients with conflicting interest. Disciplinary Rule 1.7, 1.8, and 1.9. Free speech does not allow a lawyer to make a false statement of material fact or law to a

court, Rule 3.3(a)(1); or offer evidence that the lawyer knows to be false. Rule 3.3(a)(4). Prosecutors are not allowed to exercise their free speech to disclose the fact or any indictment being found by a grand jury until the arrest or recognizance of the defendant. Section 545.090 RSMo. Free speech does not allow a lawyer to communicate with an opposing party who is represented by another lawyer. Rule 4.2. Free speech does not allow a lawyer to make false or misleading communications about his services. Rule 7.1. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Free speech does not allow a lawyer to testify in a case where he is an advocate, except in limited circumstances. Rule 3.7; 7 C.J.S. Attorney and Client, Sec. 87, p. 1006. Free speech does not allow a lawyer to have ex parte communication to a judge about a pending case. *Re Chopak*, 60 F.Supp. 265 (D.C., NY (1946, aff. 160 F2d 886, cert. denied 331 U.S. 835)).

Rules restricting lawyers from solicitation of clients do not violate the lawyer's freedom of speech. *Oralick v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), *In Re Jones*, 431 S.W.2d 809 (MO 1966), *In Re Woodward*, supra, 7 C.J.S., Attorney and Client, Sec. 47, p. 908. Likewise, a lawyer's free speech is not violated by court rules prohibiting lawyer advertising under certain circumstances. *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985). Obscene epithets directed towards a judge in a court proceeding could be found a contempt of court. *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974).

#### D. APPLICATION TO THE INSTANT CASE.

##### 1. EXTRA-JUDICIAL STATEMENTS

The Bar Committee asserts that Respondent's attack upon Judge Karohl's integrity was the culmination of a series of unethical acts in the prosecution of the *Bulloch* case, including 1) Respondent's public statements criticizing the jury, 2) Respondent's public comments about Defendant Bulloch's character, credibility, reputation and record, and 3) Respondent's



public expression of opinion as to Bulloch's guilt of murder, both before the trial, and after Bulloch was acquitted of murder and found guilty only of involuntary manslaughter.

Under the Disciplinary Rules, a prosecutor may not make extra-judicial statements to be publicly disseminated if he knows or reasonably should know that it will have a substantial likelihood of materially prejudicing adjudicative proceeding". Rule 3.6(a), Rule 3.8(e). The rules further provide that such a statement "ordinarily is likely to have such an effect when it refers to . . . a criminal matter", and the statement relates to "the character, credibility, reputation or criminal record of a party", Rule 3.6(b)(1); or to "any opinion as to the guilt or innocence of a defendant or suspect." Rule 3.6.(b)(4). Also see 7 C.J.S., Attorney and Client, Sec. 53 b, p. 925; Volume 2 ABA Standards for Criminal Justice, Fair Trial and Free Press, Second Ed., Sec. 8-1.1, (1978), (which is essentially equivalent to Disciplinary Rule 3.6.); Prosecutorial Misconduct, *supra*, Sec. 6.2(f).

The tendency of a minority of prosecutors and defense council to indulge in "trial by press" is a disservice to the fair administration of justice. ABA Standards, The Defense Function, Sec. 4-1.4.16. The expression of a Prosecutor's personal opinion as to the guilt of a defendant "is condemned because it unfairly exploits the tremendous power and prestige of the prosecutor's office." Prosecutorial Misconduct, *supra*, Sec. 10.5.

The ABA Standards further provide that "a prosecutor should not make public comments critical of a verdict, whether rendered by a judge or jury" since such remarks may improperly influence the jurors in other cases to which they may be assigned. ABA Standards, *supra*, 3-5.10., and commentary thereon.

## 2. RESPONDENT'S CRITICISM OF THE BULLOCH JURY.

Respondent Westfall was not present during the initial trial of Dennis Bulloch for the murder of his wife. However, when the jury acquitted Bulloch of murder and found him guilty only of involuntary manslaughter, Respondent sought out reporters of the St. Louis Post Dispatch and held what amounted to a press conference (MBA Ex. 4, Article quoting the same). In that conference Respondent criticized the jury and questioned its integrity, asserting among other things "they didn't compromise: they caved in. That is a heartbreaker — for this office, for Julia's family, and for the community." The statement clearly implied that Bulloch was guilty of murder despite the jury's verdict.

At this conference Respondent also reported a "public outrage" at the jury's verdict. However, defense counsel later argued that any "public outrage" had been generated "between the media and Mr. Westfall . . . [who] threw so much fuel on this fire . . .". (Ex. 6, p. 37-47); and that the actions taken by Mr. Westfall were based upon false assumptions of such outrage (Ex. 6, p. 38, 40).

That some jurors in the Bulloch case were affected by Respondent's statements is suggested by their subsequent responses to his criticism, the extensive publicity, and direct contact by the media. Although the jury verdict had been unanimous and the jurors had been polled, and individually affirmed the verdict in open court, it was later reported that some of the jurors equivocated and even expressed disagreement or regret with the verdict following the public criticism. (MBA Ex. 4, MBA Ex.6).

Another danger to the administration of justice undoubtedly arose the next day or week when these jurors returned to serve in other criminal cases. At that time each of them had to contem-

plate that if he or she failed to vote for a guilty verdict, he might again be subject to a critical attack by the prosecutor in the newspapers and/or other media. The average juror would undoubtedly like to avoid such an attack, and would probably have considerable doubt as to his own abilities to make an appropriate response or command media attention.

It may also be observed that many of the 33 Circuit and Associate Circuit Judges in St. Louis County are regularly conducting criminal jury trials involving in the total, hundreds of jurors. Undoubtedly, most of these jurors would not be influenced by Respondent's remarks, but others of less fortitude might be reluctant not to convict criminal defendants if they also felt personally threatened by Respondent's public attack upon other sitting jurors.

It must also be considered that at this time the manslaughter conviction was still pending in the trial court since various motions could be filed and presented to the trial judge prior to any appeal of the case. Respondent's improper attack upon the jury was thus an attack on the court process and presented the appearance of an attempt to influence or intimidate the trial judge as well. Prosecutors should "avoid the fact or appearance of trying to intimidate a judge". ABA Standards, *supra*, Sec. 3-5.10 and Commentary. "Even after the verdict the prosecutor remains under a duty not to make statements that could affect the defendant's sentencing." Prosecutorial Misconduct, *supra*, Sec. 6.2(j).

At the time of Respondent's remarks about the Bulloch case and its jury, Bulloch was awaiting trial on the arson trial. Obviously, members of the public exposed to his remarks would serve upon that jury. "When a defendant is awaiting trial, comments by the prosecutor on the heinousness of the crime can reflect adversely on the defendant's character, and therefore are prohibited." Prosecutorial Misconduct, *supra*, Sec. 6.2(c).

Lastly it must be recognized that the grand jury, which had originally indicted Defendant Bulloch, was still sitting when Respondent criticized the trial jury on June 3rd. Thus Respondent's remarks relating to Bulloch's character, credibility and reputation, and his expression of opinion as to Bulloch's guilt, were also improperly directed to the grand jury. Respondent's reference to Bulloch's guilt of the murder or manslaughter charge was also a direct reference to Bulloch's guilt of the armed criminal action charge (the same offense) which was immediately submitted to the grand jury. The grand jury then indicted Bulloch on "armed criminal action" within two weeks of Respondent's statement.

The United States Supreme Court has held that grand juries have equally important functions of first serving as a prosecutorial and investigative arm of the state, and second to safeguard citizens against an overreaching prosecutor and unfounded accusations. *Butterworth v. Smith*, 494 U.S. \_\_\_, 108 L.Ed. 2d 572, 580 (1990). It is certainly preferable that grand jury indictments should result from matters presented to them during their deliberations, and not from matters presented to them by the media. The restrictions on extra-judicial statements by both prosecutors and defense lawyers apply from the beginning of the criminal investigation, and during the time of presentation to a grand jury. Commentary ABA Standards, *supra*, Sec. 8-1.1 (1978).

Prosecutor's "have the ability to influence and insure proper government procedure without resort to public opinion . . . . The judicial system . . . has the right to expect that its own officers will not make public that which should not reach a juror . . . . The possible prejudicial effect of negative comment [on "character, reputation, or prior criminal record" of a defendant] is self evident . . . . The prohibition on opinion as to guilt or innocence is permissible since this is a traditional ethical requirement in the legal profession and such an opinion could never properly be offered in court." *Chicago Council of Lawyer's v. Bauer*, *supra*,

522 F.2d 242, 253-255. Also see, *In Re Rachmiel*, 449 A.2d 505, 510 (NJ 1982).

### 3. RESPONDENT'S PRESS RELEASE ABOUT NEW CHARGES.

Prosecutors are also prohibited from exploiting their office by means of personal publicity connected with a case before trial, during trial or thereafter. Volume 1, ABA Standards, The Prosecution Function, *supra*, Sec. 3-1.3(a). The Commentary to this section states that a prosecutor should not exploit the power and prestige of his office for purposes of personal aggrandizement and further states: "Circumspection in this respect is more acutely required in cases that excite public interest." "Prosecutors have been condemned . . . for utilizing the vehicle of the 'press conference' to celebrate with considerable fanfare a defendant's indictment." Prosecutorial Misconduct, *supra*, Sec. 6.2 "Television's impact before trial can be monumental." *Id.*, Sec. 6.2(k).

On June 18, 1986, fifteen days after the jury verdict, Respondent issued a press release (MBA Ex. 5). This release announced that Dennis Bulloch had been charged with the felonies of armed criminal action and destroying physical evidence. The press release indicated Respondent's continuing belief of Bulloch's guilt of premeditated murder, and reiterated that the jury had "made a tragic mistake". Respondent announced his goal to keep Mr. Bulloch in prison "for a long long time", and a second goal to prevent Bulloch from receiving any interest in his deceased wife's estate. The release announced the institution of "civil forfeiture proceedings" in this respect, that the bond was one-half millions dollars, and that Respondent would oppose any release prior to trial. It again referred to the "public outrage" concerning the jury's verdict. On June 19, 1987, the St. Louis Post Dispatch published an article (MBA Ex. 6) substantially based upon this press release.

Respondent's press release was a further attack upon the members of the initial Bulloch jury, and was intimidating to them in their continuing service as jurors as well as to all other sitting jurors in the discharge of their official duties. The statement also improperly commented upon the character, and guilt or innocence of Mr. Bulloch on the new charge of armed criminal action, which was still to be heard by another jury. Respondent's statements could improperly prejudice potential jurors for that trial. Although a change of venue of the trial of the case could partially avoid this consequence, to some degree that infringes on a defendant's right to trial in the county where he lives when he is compelled to take a change of venue by improperly generated publicity. There is also the danger that jurors in another jurisdiction could also be infected by the reach of the metropolitan St. Louis media.

#### 4. RESPONDENT'S CRITICISM OF JUDGE KAROHL.

As noted, speech is subject to reasonable time, place, and manner restrictions. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984).

The "time" factor is present in this case. In the context of "conduct" under Rule 8.4, it must also be recognized that the Bulloch case was still pending at the time of Respondent's statement about Judge Karohl. The arson and tampering charges were still pending in the trial court, and the armed criminal action case was still pending before the Court of Appeals. Judge Karohl and his colleagues would still be required to rule on various motions to be filed by the state, including motions for rehearing, to transfer to the Appeals Court En Banc, or to transfer to the Supreme Court. Whatever action Judge Karohl took on such motions could be perceived by the public to be a response to Respondent's intimidating statements. There was evidence in this case of a public perception of such influence by testimony that a lawyer inquired of Judge Karohl if Respondent's statement



was “going to coerce your views on legal matters in the future?” (MBA Ex. 1, p. 29)

Although “judges are supposed to be men of fortitude, able to thrive in a hardy climate”, *Craig v. Harney*, 331 U.S. 367, 376 (1947), comment on pending cases may affect judges differently and may influence some judges more than others. *Pennekamp v. Florida*, supra, 328 U.S. at 348. Judges are human and there is a danger that some judges might be consciously or unconsciously influenced by improper extra-judicial comment prior to the conclusion of a case. Thus “[a] state may protect against the possibility of a conclusion by the public under [such] circumstances that the judges action was in part a product of intimidation, and did not flow only from the fair and orderly working of the judicial process. *Chicago Council of Lawyers v. Bauer*, supra at p. 256. There is no distinction between bench trials and jury trials. *Id.*, p. 257. Extra-judicial statements should be judged with a view to their likely effect on the public’s belief in the integrity of a court as an institution. *Matter of Frerichs*, 238 N.W.2d 764, 767 (IA 1976).

It is recognized that comments made by attorneys about ongoing trials can carry significant weight in the minds of members of the public including potential jurors, witnesses and others who may have a role to play in the trial. *In Re Hinds*, 449 A.2d 483, 496 (NJ 1982); and that extra-judicial statements by prosecutors and defense council should not be permitted to frustrate the function of the court. *Id.* at p. 491. A lawyer’s false accusations against a judge can be an assault directed at the judicial system and challenging the integrity of the court system and its officers. *Matter of Terry*, 394 N.E.2d 94, 96 (IN 1979). A lawyer’s harassing or intimidating statements about a pending case may amount to professional misconduct. *State v. Nelson*, 504 P.2d 211, 215 (KS 1972). *Eisenberg v. Boardman*, 302 F Sup 1360, 1365 (1969)

As Justice Frankfurter has observed: "The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect. Forbidden comment is such as will or may throw psychological weight on the scales which the court is immediately balancing." *Pennekamp*, at page 369.

A permissible restriction on "place" also applies here where Respondent's false statement about Judge Karohl was made on public television to be heard in the homes of thousands of viewers, rather than in the office of the Commission on Judicial Discipline.

The compelling interest of the State in the public perception of the integrity of the judicial process was obviously far more seriously harmed by this massive report. The false statement was given undue credence because 1.) "many people tend to automatically accept [television news] as conveying truth", *Restatement*, supra, Section 568 A, Comment a; 2.) because of Respondent's position and authority; and 3.) because Judge Karohl was unable to make any response under Ethical Rules concerning a judge's comment on pending cases.

Permissible "manner" factors are also involved here. If Respondent had held the belief that Judge Karohl had acted improperly, he was obligated by Disciplinary Rule 8.3(b) to inform the Commission on Retirement, Removal and Discipline which deals with judicial misconduct under Supreme Court Rule 12. See *In Re Jafree*, 444 N.E.2d 143, 149 (IL 1982).

The Supreme Court of Arizona has held that "any grievance a lawyer may have concerning ethical misconduct by a sitting judge should be submitted to the Commission on Judicial Qualifications. 'Going public' by a member of the bar is not the appropriate method to redress misconduct by a judge". *Matter of Riley*, 691 P.2d 695, 705 (AZ 1984). Accord: *Heleringer*, supra at p. 168; *State Ex Rel Neb. v. Michaelis*, 316 N.W.2d 46,

54 (Neb. 1982). Making public remarks about alleged improper conduct rather than taking constructive remedial action was held to belie the assertion that the statements were made in "good faith". *Matter of Lacey*, 283 N.W.2d 250, 252 (S.D. 1979).

4. Another issue may be noted. Disciplinary Rule 3.8 provides that a prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." It is absolutely clear that the issues raised by the "armed criminal action" charge, filed after Bulloch's conviction for manslaughter, had been resolved by that conviction. As a matter of law the subsequent charge of "armed criminal action" was not "supported by probable cause". This aspect of the case is not discussed here in order to determine whether Respondent violated this Disciplinary Rule. This has not been presented. However it is evidentiary of Respondent's state of mind and pattern of conduct.

5. With some reluctance, but with a feeling of necessity and propriety, your Master also judicially notices newspaper reports of certain statements attributed to Respondent following the hearing before the Master on February 23rd, 1990.

The St. Louis Sun of February 24th, 1990, quoted Respondent as stating after the hearing that the effort to disbar him was "absurd, offensive, and outrageous" (Master's Ex. "A").

The St. Louis Post-Dispatch of February 24th, 1990, quoted Respondent as stating: "This is an effort to muzzle me and I'm going to fight it. I want the public to be my judge and jury." (Master's Ex. "B").

The St. Louis Sun of February 25th, 1990, quoted Respondent as stating that "Prosecutors shouldn't be muzzled by a commission". (Master's Ex. "C").

The St. Louis Sun of February 25th had a second article reporting speculation that the timing of the hearing on Respon-

dent was purely political since it was ten days before he was to make a political announcement. In this respect Your Master reports that a previous hearing date on January 29th, 1990, had been cancelled because the attorneys for the Advisory Committee and for Respondent had agreed to submission of the case upon stipulations and exhibits. However, it was Respondent who personally requested subsequent public hearing which was scheduled at the earliest date mutually convenient for the lawyers and the Master. It is also noteworthy that this article from the Sun quotes Respondent's attorney about the scheduling of the hearing as stating: "There was nothing political about it". (Master's Ex. "C")

The Post-Dispatch of February 26th quoted Respondent as stating two days after the hearing that the recommendation that he be suspended from practicing law was "completely politically motivated", and that the lawyer for the Missouri Bar Advisory Committee was "arrogant", "biased", and "vindictive". (Master's Ex. "D").

The Post-Dispatch of February 27th also reported that Respondent had accused the lawyer for the Advisory Committee of "political bias", and that the recommendation was "totally insane". (Master's Ex. "E").

It cannot be assumed that the reports are true since no evidence has been had upon them. They will not be considered by the Master in determination of the issues presented in this case.

However, since the reports were made, two considerations should at least be noted:

First, although a lay person might be free to make such remarks, a lawyer might not be. The fact that Respondent is a party in this proceeding does not change his status as a "lawyer", with professional obligations in this pending case. Such statements by a lawyer could give the appearance of an improper

attempt to influence, coerce, or intimidate the outcome of the pending proceeding. To the extent that any of the reports were also found to be false, these could also unfairly undermine public confidence in the administration of justice.

Second, such remarks about an opposing attorney in the case might also be improper under the Disciplinary Rules. Chief Justice Hyde has asserted that a lawyer “has no right to attempt to cast foul and unfounded aspersions upon the character and conduct of his brother members of the bar.” *Leimer v. Hulse*, supra, 178 S.W.2d at 340.

It may be plainly stated. Politics are not involved in this case. The issues presented relate only to professional misconduct. Like all other cases, this one cannot be tried in the media (though the public may make its own judgments.) The public did not hear the hours of testimony or examine the hundreds of pages of documents and testimony, which are the basis of this report.

The Master makes a separate finding at this point that Mr. Oliver, as attorney for the Advisory Committee, and Mr. Schaaf, as attorney for Respondent, have both zealously, ably, and honestly represented their clients in this proceeding.

#### F. FINDING OF FACT AS TO DISCIPLINARY RULE 8.4

Upon the evidence in this case, the Master makes the following findings of facts:

1. That the findings of fact under the analysis of Rule 8.2 are adopted and incorporated herein.
2. That the Respondent improperly attacked and criticized the initial Bulloch jury following its verdict.
3. That in his initial criticism of the Bulloch jury, Respondent improperly made public statements concerning Bulloch’s character, credibility and reputation, and expressed opinions as to Bulloch’s guilt or innocence.

4. That the criticism of the initial Bulloch jury was made at a time when the manslaughter conviction was still pending before the trial judge, and the arson charge was pending and awaiting jury trial.

5. That, in his press release announcing further charges against Bulloch, Respondent improperly made public statements concerning Bulloch's character, credibility and reputation, and expressed opinion as to Bulloch's guilt or innocence at a time when the manslaughter conviction was still before the trial judge, and the arson, armed criminal action, and tampering charges were pending and awaiting jury trial.

6. That Respondent's false public statement about Judge Karohl was a misrepresentation and an unwarranted assault upon the Court of Appeals and its officers.

7. That Respondent's public statement about Judge Karohl was made at a time when the armed criminal action matter was pending before a panel of the Court of Appeals, including Judge Karohl, and while the arson and tampering charges were pending and awaiting jury trial.

8. That Respondent's extra-judicial statements in the above findings amounted to "conduct" improperly attacking or seeking to influence the court system and it's [sic] personnel, i.e. jurors, trial judges, and appellate judges.

9. That there was no "communicative impact" or free speech "content" in Respondent's known false statements about Judge Karohl.

10. That Respondent failed to maintain the respect due from a lawyer to a court of justice and it's [sic] judicial officers.

11. That Respondent's known false statements unfairly undermined public confidence in Judge Karohl, the Court of Appeals, and in the Administration of Justice.



12. That Respondent had, but failed to use, ample, alternative channels of making any charges of alleged judicial misconduct.

13. That Respondent's various extra-judicial statements in the above findings were an exploitation of his office and a sensational case for personal publicity and self-aggrandizement.

#### G. CONCLUSIONS OF LAW AS TO DISCIPLINARY RULE 8.4

Upon the evidence in this case and the foregoing discussion the Master makes the following conclusions of law:

1. That the conclusions of law as to Disciplinary Rule 8.2, *supra* are adopted and incorporated herein.

2. That Respondent's public criticism of the initial Bulloch jury's verdict while that case and the arson charge were still pending constituted professional misconduct.

3. That Respondent's criticism of the Bulloch jury had a substantial likelihood of materially prejudicing a pending adjudicative proceeding in violation of Disciplinary Rule 3.6(a), 3.6(b)(1), and 3.6(b)(4), and ABA Standards, Section 8-1.1 and Standard 3-5.10.

4. That Respondent's press release announcing additional charges against Defendant Bulloch constituted professional misconduct in violation of Disciplinary Rule 3.6 and ABA Standards, Section 8-1.1.

5. That Respondent known false statements concerning Judge Karohl violated Disciplinary Rule 8.4(d).

6. That Respondent violated Disciplinary Rule 8.4(a) by violations of Rule 8.2, 8.4(d), and of Rule 3.6.

7. That the Disciplinary Rules, as applied to Respondent's known false statement against Judge Karohl, further an impor-

tant governmental interest, unrelated to suppression of free expression; and that these restrictions are no greater than essential in the furtherance of that interest.

8. That the Disciplinary Rules, as applied to Respondent's false charges against Judge Karohl, are not unconstitutional as a violation of the "free speech" clause of the First Amendment.

9. That the Advisory Committee has sustained its burden of proof by clear and convincing evidence.

## V RECOMMENDATIONS

### A. THE CHARGE

It must first be clearly stated that the *only* charge made by the Advisory Committee against Respondent relates to his false statements about Judge Karohl.

The other acts of professional misconduct which have been found here are not charged, and they will only be considered by your Master as they relate to the Committee complaint. The evidence and findings as to other misconduct do establish a "pattern of conduct" and give perspective to the charged offense. They relate to state of mind, malice, motivation, and scienter. They are also relevant as an aggravating circumstance. Repeated violations of Disciplinary Rules "dispel any idea of inadvertence, and present the question of the cumulative effect of such improprieties." *State v. Tiedt*, 206 S.W.2d 524, 538 (Banc 1947).

### B. AGGRAVATING CIRCUMSTANCES

Respondent's professional misconduct was certainly destructive of the public perception of the Missouri Court of Appeals and its officers, and personally and professionally damaging to a judge whom Respondent recognizes as having unquestioned personal integrity.

Respondent's twenty years of experience as a prosecutor belies any suggestion that he may have acted inadvertently or mistakenly, but rather that he did so knowingly or recklessly of the damage that he would cause. The only apparent conclusion is that the very unusual and sensational aspects of the case afforded him an opportunity of personal publicity and self-aggrandizement which he utilized without reflection upon the serious consequences entailed.

It is a matter of grave concern that Respondent has an attitude that he should have a completely unlimited and unfettered license of public comment about all aspects of pending criminal cases, whether or not such comment violates the law as provided by the Disciplinary Rules of the Supreme Court. This is aggravated in this case where Respondent admits the falsity of the comment made.

Although a prosecutor must be zealous in the execution of his duties in the administration of justice for the protection of the public, he cannot himself violate the law, even to achieve legitimate ends; nor can he do so for the purpose of self-aggrandizement. A prosecutor is not above the law or beyond the reach of the Disciplinary Rules.

It is even more important for government officials to obey the law than for others to do so. This concept has been ably expressed by Justice Brandeis in the case of *Olmstead v. United States*, 277 U.S. 438 (1928) as follows:

"Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Respondent has shown a lack of restraint and self discipline in his dealing with the courts and its personnel, including jurors and

a judge (and perhaps even the Advisory Committee and its attorney). He has not realized that "... epithets, verbal abuse, unfounded accusations and the like have no place in legal proceedings." *Matter of Ronwin*, 680 P.2d 107, 115 (Arizona 1983); or "... that civilized, rational behavior is essential if the judicial system is to perform its function." *Id.* Habitual, unreasonable reaction to adverse rulings is conduct of a type not permitted of a lawyer when acting as a lawyer, and may reveal a lack of responsibility relating to fitness to practice law. *Id.* The custom of vilifying those who oppose him is improper conduct for a lawyer. *Id.*, page 118.

### C. MITIGATING CIRCUMSTANCES

Respondent's attorney has reported that Respondent has been "a good public servant for twelve years and ... a good prosecutor for over twenty years, who has served his community and served the constituents of this state very well and honorably. ... He's a decent human being; he's honest; he's an outstanding member of the Missouri Bar, and he values his license and his right to practice law in this state most highly ..."

It can also be noted that the state of the law as to lawyer's extra-judicial statements and criticisms of judges has been somewhat in a state of flux since the decision in the *New York Times* case in 1968. See Commentary ABA Standards, Sec. 8-1.1. To that extent there may have been some uncertainty as to application of the Disciplinary Rules. The Comment to Disciplinary Rule 3.6 recognizes also that: "It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free express."

False expressions have no constitutional value, and professional misconduct must be controlled. However, the public has an important and legitimate interest in the conduct of judicial proceedings, and lawyers do have a duty under Disciplinary Rule 8.3(b) to inform appropriate authority of a judge's violation of

Rules of Judicial Conduct. It is important that a "chilling effect" is not has upon such legitimate free speech.

Respondent has privately stated his belief in Judge Karohl's personal integrity. At the Committee hearing Respondent also privately apologized to Judge Karohl. This is a mitigating circumstance. However, he has failed to make any such public statements; and thus has failed to alleviate the damage that he has done to the Court of Appeals or to Judge Karohl. Therefore a public recognition of Respondent's belief in Judge Karohl's personal integrity, and a public apology to the Court of Appeals and to Judge Karohl would be helpful in restoring the public confidence in the administration of justice. This would have a further mitigating effect.

Lastly, it is recognized that the purpose of this proceeding is to protect the public by correction of any improper actions. Hopefully these proceedings and the recommended sanctions will accomplish that end.

D. Upon the foregoing, it is the recommendation of the Master that:

1. Respondent be suspended from the practice of law for a period of one year.

2. That the order of suspension be stayed; that Respondent be publicly reprimanded; and that Respondent be placed on probation for a period of one year with the conditions that:

- a. That he obey the Disciplinary Rules.
- b. That he make a public apology to the Court of Appeals and the Hon. Kent E. Karohl.
- c. That costs be taxed to Respondent.

Respectfully submitted.

/s/ Bruce Normile  
Special Master

**APPENDIX C**

**No. 72022**

**In the Supreme Court of Missouri  
May Session, 1991**

**In re: In the Matter of George E. (Buzz) Westfall,  
Respondent.**

**(DISCIPLINARY PROCEEDING)**

Now at this day, come the parties aforesaid, the informants by their attorney and the respondent by his attorney, and the Court having considered the report of the Master, the Honorable Bruce Normile, and thereafter, the above-entitled cause having been fully heard, briefed, argued and submitted to the Court; and the Court now being sufficiently advised of and concerning the premises, it is ordered that the respondent be, and he is hereby, reprimanded for violation of the Rules of Professional Conduct.

It is further ordered that the costs herein are taxed against the respondent.

(Opinion filed.)

**STATE OF MISSOURI-Sct.**

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1991, and on the 3rd day of May 1991, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 3rd day of May 1991.

/s/ Thomas F. Simon  
Clerk



**APPENDIX D**

CLERK OF THE SUPREME COURT  
STATE OF MISSOURI  
POST OFFICE BOX 150  
JEFFERSON CITY, MISSOURI  
65102  
June 11, 1991

Mr. George E. Schaaf  
Pierre Laclede Center, Suite 800  
7733 Forsyth Boulevard  
Clayton, Missouri 63105

In re: George R. (Buzz) Westfall  
Supreme Court No. 72022

Dear Mr. Schaaf:

Please be advised that the Court this day entered the following order in the above-entitled cause:

“Respondent’s motion for rehearing overruled.”

Very truly yours,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney  
Deputy Clerk, Court en Banc

cc: Mr. George R. Westfall  
Mr. Harold W. Barrick  
Mr. John L. Oliver, Jr.

## APPENDIX E

### EXAMPLES OF NEGATIVE COMMENTARY

*United Steelworkers of America v. Weber*, 443 U.S. 193, 218 (1979) (dissenting opinion of Burger, C.J.):

It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the “hard” cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a “desirable” result. . . .

# # # #

*Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3067, 3075 (1989) (opinion of Blackmun, J., concurring in part and dissenting in part):

Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions.

— Nor in my memory has a plurality gone about its business in such a deceptive fashion. . . .

. . . .

The opinion contains not one word of rationale for its view of the State’s interest. This “it-is-so-because-we-say-so” jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.

# # # #

*United Steelworkers of America v. Weber*, 443 U.S. 193, 222 (1979) (dissenting opinion of Rehnquist, J.):

Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, “uncontradicted” legislative history and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions. . . .

# # # #

*National League of Cities v. Usery*, 426 U.S. 833, 867, 872, (1976) (dissenting opinion of Brennan, J.):

Today’s repudiation of this unbroken line of precedents that firmly reject my Brethren’s ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree. . . .

. . . .

Moreover, it is sophistry to say the Economic Stabilization Act “displaced no state choices,” *ante*, at 2474, but that the 1974 amendments do, *ante* at 2472. . . .

# # # #

*Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 712-713 (1980) (dissenting opinion of Marshall, J.):

In short, today’s decision represents a usurpation of decision making authority that has been exercised by and properly belongs with Congress and its authorized representatives. The plurality’s construction has no support in the statute’s language, structure, or legislative history. The threshold finding that the plurality requires is the plurality’s own invention. It bears no relationship to the acts or intentions of Congress, and it can be understood only as reflecting the personal views of the plurality as to the proper allocation of resources for safety in the American workplace.

# # # #

*State v. Mowery*, 1 Ohio St. 3d 192, 203, 438 N.E.2d 897, 905 (1982), *cert. denied*, 466 U.S. 940 (1984) (opinion of Celebrezze, C.J. concurring in part and dissenting in part):

The bottom line, then, is that the majority opinion, in authorizing Mrs. Mowery to testify against her husband in his prosecution for the murder of Laughlin, is demonstrably incorrect, plainly disingenuous, intellectually dishonest and institutionally flawed. . . .

# # # #

*State v. Anderson*, 211 Mont. 272, 301, 686 P.2d 193, 208 (1984) (dissenting opinion of Morrison, J.):

Members of our Court have, by way of dissent, been termed "intellectually dishonest." I find that expression inappropriate to adequately impart the intensity of my opposition to what seems a clear abrogation of judicial responsibility. . . .

# # # #

*State v. Wurtz*, 195 Mont. 226, 239-240, 636 P.2d 246, 253 (1981), (dissenting opinion of Morrison, J.):

The majority opinion states: "The decision to apply felony punishments to seemingly harmless conduct rests with the legislature." This startling statement shreds the Constitution, abdicates judicial responsibility, and creates an Imperial legislature.

# # # #

Bork [Judge Robert H.], *THE TEMPTING OF AMERICA* (FREE PRESS 1990), PP. 30-31 (discussing Justice Taney's opinion in the *Dred Scott* case):

The crucial passage comes near the end of his opinion, and it is as blatant a distortion of the original understanding of the Constitution as one can find.

. . . .

The second sentence is additionally dishonest because it postulates a man who had “committed no offense against the laws,” but a man who brings slaves and keeps them in a jurisdiction where slavery is not permitted does commit an offense against the laws. . . .

Though his transformation of the due process clause from a procedural to a substantive requirement was an obvious sham, it was a momentous sham. . . .

# # # #

Lusky, *BY WHAT RIGHT?* (Michie 1975), p. 194 (discussing Justice Miller’s opinion in the *Slaughter-House* cases):

Incredible as it may seem, Justice Miller’s opinion (1) deliberately misquotes the Constitution in a material respect; (2) trims a quotation from *Corfield v. Coryell* in a manner which obscures the fact that, from his viewpoint, it was harmful rather than helpful authority; and (3) denies, erroneously, that Congress had ever undertaken to define the privileges and immunities of Federal citizenship. . . . examine these points in order.

# # # #

*The New York Times*, August 17, 1990, section A, p. 28 (letter to the editor from Brian Graifman, a lawyer).

The other judge besides David H. Souter that President Bush interviewed to fill the Supreme Court vacancy, Edith H. Jones of the United States Court of Appeals, Fifth Circuit, is dangerous for reasons beyond her views on death-row appeals. . . .

. . . .

Judge Jones' opinion repeatedly cites the Meese Commission's report on pornography, which was condemned almost universally by scholars and newspapers as biased and intellectually dishonest. By making it a basis for her opinion, Judge Jones calls into question her own integrity.

# # # #

*The New York Times*, February 25, 1990, section 6, p. 32:

For Alastair Logan solicitor for the defendants, the Appeal Court was a legal charade. "The judges could not bring themselves to believe that terrorists could tell the truth and the police could tell lies," he says. "I got the distinct impression that the final judgment was written beforehand. The answer was no, and the judges worked back to find how they could get there. It was such an intellectually dishonest exercise I do not believe anyone reading it today could believe it was an honest judgment."

# # # #

*The Washington Post*, July 8, 1979, p. A1 (reporting comments concerning various recent Supreme Court decisions):

"The majority opinion [in *United Steelworkers v. Weber*] was without substantial basis in any way, shape or form" he [Philip B. Kurland of the University of Chicago] charged.

. . . .

A criticism of the decision [in *Gannett Co. v. DePasquale*] by Stanford University's Gerald Gunther was especially notable because he offered it after venting to a reporter his dismay over "doomsday" and "self-defeating" reactions by press groups to earlier rulings involving the First Amendment. "Hysterical," he said "Bizarre, grotesque."



. . . .

Harvard's Tribe found the decision [in *Gannett*] "outrageous" and could "think of nothing to say in [its] defense."

Bruce Ennis, legal director of the American Civil Liberties Union, called it "one of the worst decisions of the Burger court." Prosecutors will have "free rein to offer defendants deals in return for defense support of secrecy," he said.

. . . .

Some of the experts saw in several decisions, including *Gannett*, the extension of a long-term trend among the justices to be "activist" and "result-oriented," with anomalies resulting.

"They do justice as they see it, with out regard to the intent of the framers, the Constitution and their own precedents," Philip Kurland protested in Chicago.

# # # #

*St. Louis Post-Dispatch*, May 15, 1991, p. 3C (editorial by Judge Stephen Reinhardt of the U. S. Court of Appeals for the Ninth Circuit):

The U. S. Supreme Court is out of the closet. The myth that it is only liberals who are judicial activists stands exposed.

The Supreme Court has never acted in as nakedly activist a manner as did the Rehnquist court last month in a case known as "McCleskey II" (*McCleskey vs. Zant*). . . .

. . . .

Certainly, today's majority is no believer in judicial precedent. Nor does it follow the doctrines of judicial restraint or strict construction. A far different term than conservative is needed to describe the activist right-wing majority that is currently rewriting U. S. constitutional law in its own image.

